Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

THE VILLAGE OF GLENDALE, OHIO,

Petitioner,

v.

CHRISTOPHER J. PAGAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Christopher J. Pagan filed a civil action against The Village of Glendale, Ohio and its police chief challenging a municipal ordinance which prohibited Respondent from displaying a used car for sale on a public street in the Village. Respondent contended that the ordinance violated his First Amendment rights. The District Court granted Petitioner's motion for summary judgment concluding that the ordinance was not an unconstitutional invasion of Respondent's First Amendment rights. Respondent appealed and a panel of the Sixth Circuit Court of Appeals affirmed in *Pagan v. The Village of Glendale, Ohio*, 2006 U.S. App. LEXIS 12243 (6th Cir.2006) (App. 47a). After granting Respondent's request for a re-hearing on en banc, the Sixth Circuit Court of Appeals in an 8 - 7 decision reversed in *Pagan v. The Village of Glendale, Ohio*, 492 F.3d 766 (6th Cir.2006). (App. 1aa). The question presented is:

Whether the 6th Circuit decision in *Pagan v. The Village of Glendale, Ohio*, 492 F.3d 766 (6th Cir.2006) (App. 1a) is correct in holding a municipality's common sense legislative determination that allowing business to be conducted in the roadway presents certain traffic hazards or affects aesthetic interests must be supported by studies or other evidence because it has an incidental impact on commercial speech?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF APPENDICES iv

TABLE OF CITED AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

RELEVANT PROVISIONS INVOLVED 2

STATEMENT 2

a. Summary of Relevant Facts 2

b. Decision of the District Court 4

c. Panel Decision of the Sixth Circuit 5

d. En Banc Decision of the Sixth Circuit 5

REASONS FOR GRANTING THE PETITION ... 7

A. This Court should clearly state that *Metromedia's* application of *Central Hudson*'s third prong to signs is still good law: common-sense judgments of local

Contents

Page

lawmakers can establish that an ordinance directly advances substantial governmental interests in traffic safety and aesthetics unless they are unreasonable. The Sixth Circuit's decision impermissibly modifies prior decisions of this Court. 7

B. By holding that record evidence is required to support common sense legislative judgments, the Sixth Circuit's decision is in conflict with the other federal circuit courts of appeal. 14

CONCLUSION 17

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Sixth Circuit Filed June 29, 2007 ..... 1a

Appendix B — Opinion Of The United States Court Of Appeals For The Sixth Circuit Filed May 19, 2006 ..... 47a

Appendix C — Memorandum And Order Of The United States District Court For The Southern District Of Ohio, Western Division Dated September 30, 2004 ..... 71a

TABLE OF CITED AUTHORITIES

Page

CASES

Ackerley Communications of the Northwest, Inc. v. Krochalis, 108 F.3d 1095 (9th Cir.1997) 14

Advantage Media, LLC v. City of Eden Prairie, 456 F.3d 793 (8th Cir.2006) 16

Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305 (4th Cir.1995) 15

Burson v. Freeman, 504 U.S. 191 (1992) 9

Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu, 455 F.3d 910 (9th Cir.2006) 15

Central Hudson Gas & Electric Corp. v. Public Svc. Comm., 447 U.S. 557 (1980) ..... *passim*

City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) 9

City of Ladue v. Gilleo, 514 U.S. 43 (1994) 2

Edenfield v. Fane, 507 U.S. 761 (1993) 10, 11, 12

Florida Bar v. Went for It, Inc., 515 U.S. 618 (1995) 1, 7, 9, 12

Cited Authorities

Page

Greater New Orleans Broadcasting Assn., Inc. v. United States, 527 U.S. 173 (1999) 9

Ibanez v. Florida Dept. Of Business and Professional Regulation, 512 U.S. 136 (1994) 10

Lavey v. City of Two Rivers, 171 F.3d 1110 (7th Cir. 1999) 16

Lindsay v. City of San Antonio, 821 F.2d 1103 (5th Cir. 1987) 16

Long Island Bd. Of Realtors, Inc. v. Village of Massapequa Park, 277 F.3d 622 (2nd Cir. 2002) 15

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) 9

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) ..... *passim*

National Advertising Co. v. City of Denver, 912 F.2d 405 (10th Cir.1990) 16

Peak v. United States, 353 U.S. 43 (1957) 7

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) 10

Cited Authorities

Page

South-Suburban Hous. Ctr. v. Greater South-Suburban Bd. Of Realtors, 935 F.2d 868 (7th Cir.1991) 15

United States v. Edge Broadcasting Co., 509 U.S. 418 (1993) 9, 12, 16

STATUTES

28 U.S.C. § 1254 2

42 U.S.C. § 1983 ..... 2, 4

OTHER

Burt, *Speech Interests Inherent in the Location of Billboards and Signs: A Method for Unweaving the Tangled Web of Metromedia, Inc. v. City of San Diego*, 2006 B.Y.U. Law Rev. 473, 496, fn.112 13

Mandelker, *Sign Regulation and the First Amendment, in Land Use Institute Planning, Regulation, Litigation, Eminent Domain and Compensation*, 69, 72 (ALI-ABA 2000) 8, 9

The Village of Glendale, Ohio respectfully petitions that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on June 29, 2007 in order to determine whether incidental restrictions on commercial speech to foster traffic safety and to promote aesthetic interests may be justified "solely on history, consensus and 'simply common sense'", *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 628 (1995), or whether such restrictions must be justified with some artificial record evidence requirement. The Court is squarely presented with a holding that "even common sense judgments require some justification" and consequently, all legislative judgments impacting commercial speech, even those supported by simple common sense, must be supported by "some quantum of evidence, beyond its own belief and the necessity for the regulation, . . .". *Pagan v. Fruchey*, 492 F.3d 766, 771 (6th Cir. 2007). The Court should reverse the 6th Circuit's decision in this case.

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the 6th Circuit was entered June 29, 2007 and is published at *Pagan v. Fruchey*, 492 F.3d 766 (6th Cir. 2006). (App. 1a). The panel opinion of the 6th Circuit originally was published as *Pagan v. Fruchey*, 453 F.3d 784 (6th Cir. 2006) and was later withdrawn from publication because of the re-hearing en banc. The order granting the summary judgment of Chief District Judge Sandra S. Beckwith, United States District Court for the Southern District of Ohio, is not published in the Federal Supplement, but is published at *Pagan v. Fruchey*, 2004 WL 5338455 (S.D. Ohio 2004) (App. 71a).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 29, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The civil action was filed under the Civil Rights Act, 42 U.S.C. § 1983 alleging the Village of Glendale's ordinance violated Respondent's First Amendment rights. The First Amendment provides: "Congress shall make no law . . . abridging freedom of speech, or of the press . . ." The Fourteenth Amendment makes this limitation applicable to the States, and to their political subdivisions. *City of Ladue v. Gilleo*, 514 U.S. 43, 45, fn. 1 (1994).

STATEMENT

a. Summary of Relevant Facts

Respondent Pagan is a resident of the Village of Glendale, Ohio. He owned an automobile that he wanted to sell. He parked the car in front of his house on a public street, and put a "For Sale" sign in the car window. A Glendale police officer saw the sign, told Respondent that the sign was illegal under a Village ordinance, and asked him to remove the sign. The ordinance states:

> It shall be unlawful for any person to stand or park any vehicle, motorized or towed, upon any public or private street, road, or highway within the

village or upon any unimproved privately owned area within the village for purpose of:

> (A) Displaying it for sale, except that a homeowner may display a motor vehicle, motorized or towed, for sale only when owned and titled to said homeowner and/or a member of said household, and only when parked upon an improved driveway or apron upon the owner's private property
>
> (B) Washing, maintaining or repairing such vehicle except repairs necessitated by an emergency.
>
> (C) Any advertising.

Respondent sent an email to Glendale asking for a copy of the ordinance. Respondent's email also stated that he was a lawyer who litigates cases, and that he knew that "cities have been found liable in enforcing sign ordinances that prohibit commercial speech." The email was forwarded to Glendale Police Chief Matt Fruchey, who drove by Respondent's house, saw the car, and gave a copy of the ordinance to Respondent's wife. Chief Fruchey invited Respondent to call if he had further questions or concerns, but asked him to remove the sign.

Respondent instead responded that he had found a case supporting his right to "engage in commercial speech" and that he intended to file an action in federal court seeking to have the law declared unconstitutional. Chief Fruchey referred Respondent's concerns about the legality of the ordinance to the village solicitor, but told Respondent to

remove the sign or he would be cited. At approximately 6:30 p.m. that same day, a Glendale officer drove past the car and saw that the sign had been removed. Respondent was never cited by the Village for any violation of the ordinance.

b. Decision of the District Court

On July 30, 2003, Respondent filed a complaint in the United States District Court for the Southern District of Ohio contending that the ordinance violated his rights under the First and Fourteenth Amendments of the federal Constitution and under 42 U.S.C. § 1983. Respondent sought both damages and declaratory relief.

On September 30, 2004, the District Court granted the Motion for Summary Judgment of Glendale and Chief Fruchey. The District Court applied the four-prong test of *Central Hudson Gas & Electric Corp. v. Public Svc. Comm.*, 447 U.S. 557 (1980). The Court found the ordinance did not have to be supported by extrinsic evidence such as a "legislative record", as the ordinance was directly related to traffic control and safety and advanced those interests by trying to keep people out of busy streets. The District Court stated that it was not its task to "second guess" the decisions of Glendale concerning traffic safety ordinances unless they were "palpably false" or "unreasonable". *Pagan v. Fruchey*, 2004 WL 5338455 (S.D. Ohio), *5. The Court also granted summary judgment in favor of Chief Fruchey on the grounds of qualified immunity.

c. Panel Decision of the Sixth Circuit

Subsequently, Respondent filed an appeal to the United States Court of Appeals for the Sixth Circuit challenging the District Court's grant of summary judgment. On appeal, Respondent abandoned his claims against Chief Fruchey. A panel of the 6th Circuit in a 2-1 vote affirmed the District Court's grant of summary judgment in favor of the Village holding that the ordinance directly and materially advanced the asserted governmental interests of traffic safety and aesthetics. The panel stated that "By eliminating an individual's ability to advertise, wash their car, or display a for-sale sign on a public street, the Ordinance directly promotes traffic safety." 2006 U.S. App. LEXIS 12243, *12. The panel rejected Respondent's contentions that the Village presented insufficient evidence to demonstrate that the ordinance promoted public safety. The panel held that the rationale of this Court's decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) applied: "The Supreme Court has, however, previously made clear that '[i]f the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them.' ... It is self-evident that the same rationale applies to a for sale sign like the one at issue here." 2006 U.S. App. LEXIS 12243, *12.

d. En Banc Decision of the Sixth Circuit

The Respondents filed a timely petition for a re-hearing en banc which was granted by the Sixth Circuit. By an 8-7 vote, the Sixth Circuit's en banc decision reversed the District Court's grant of summary judgment and remanded the case for further proceedings. The majority held that:

"the government must come forward with some quantum of evidence, beyond its own belief in the necessity for regulation, that the harms it seeks to remedy are concrete and that its regulatory regime advances the stated goals." 492 F.3d at 771. The majority went on to state that "Thus, even common sense decisions require some justification." 492 F.3d at 777.

The dissent responded:

> To read into the First Amendment a requirement that governments go through pointless formalities before they enact such a commonsense rule is, in my view, to cheapen the grandeur of the First Amendment. To require a study, or testimony, or an affidavit, to demonstrate the obvious is to turn the law into formalistic legalism.

492 F.3d at 779. Concluding that the Glendale ordinance was a common sense judgment, the dissent stated: "Simply put, exhibiting cars for sale in the public road way may interfere with the dedication of such road ways to traffic and its necessary incidents. The ban on placing cars in the road way for sale undoubtedly directly advances the village's interest in traffic safety." 492 F.3d at 780. With reference to Glendale's aesthetic interests, the dissent stated that:

> . . . Glendale should not be required to come forward with studies to support its conclusion that city aesthetics would be improved by avoiding the transformation of public streets into used car lots or open air markets . . . Indeed insisting on a study regarding aesthetics would be particularly

> pointless given the essentially subjective nature of the topic.

492 F.3d at 784-85. The dissent cited a number of decisions of this Court that even in strict scrutiny cases, restrictions on speech may be justified "based solely on history, consensus and simple common sense." 492 F.3d at 781. *Florida Bar v. Went for It*, 515 U.S. 618, 628 (1995).

This Court is now presented with the opportunity to reverse the Sixth Circuit's opinion that in every case involving the regulation of commercial speech, legislative bodies cannot justify a regulation based upon history, consensus and common sense, but must always support their judgments – even though those based on common sense – with extrinsic evidence.

REASONS FOR GRANTING THE PETITION

A. This Court should clearly state that *Metromedia's* application of *Central Hudson's* third prong to signs is still good law: common-sense judgments of local lawmakers can establish that an ordinance directly advances substantial governmental interests in traffic safety and aesthetics unless they are unreasonable. The Sixth Circuit's decision impermissibly modifies prior decisions of this Court.

> ". . . common sense often makes good law."

Peak v. United States, 353 U.S. 43, 46 (1957).

The majority opinion below found that this Court's decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) contained no majority opinion and was confined

to billboards. However, as the dissent pointed out, "a strong majority of the court" found that the city's ban on offsite advertising was constitutional to the extent that it regulated commercial speech and that it met each element of the *Central Hudson* test. In discussing the third criteria, i.e., whether the ordinance directly advanced the identified interests, the dissent stated that a majority of the Supreme Court in *Metromedia* held that San Diego could constitutionally ban commercial speech billboards, hesitating "to disagree with the accumulated, commonsense judgments of *lawmakers* and of the many reviewing courts that billboards are real and substantial hazards to traffic safety." (Emphasis added). The majority in *Metromedia* concluded:

> There is nothing here to suggest that these judgments are unreasonable. As we said in a different context:
>
> > 'We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false.'

Id. 453 U.S. at 509.

The opinion in *Metromedia* is widely relied upon by lower federal courts. Mandelker, *Sign Regulation and the First Amendment, in Land Use Institute Planning, Regulation, Litigation, Eminent Domain and Compensation,*

69, 72 (ALI-ABA 2000). This Court, in a later opinion, expressly noted that seven justices in *Metromedia* had concluded that the City's interests in avoiding visual clutter was sufficient to justify regulation of signs posted on public property. *City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806-07 (1984).

This Court in a number of subsequent cases has recognized that even in cases applying strict scrutiny, restrictions on speech may be justified "based solely on history, consensus and 'simple common sense'". *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 628 (1995), citing *Burson v. Freeman*, 504 U.S. 191, 211 (1992). See, also, *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 428 (1993) (deferring to Congress' "common sense judgment" in finding that the restriction on commercial speech satisfied *Central Hudson's* third prong). See, also, *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173 (the third prong of *Central Hudson* may be satisfied by studies, anecdotes or "simply common sense").

Finally, this Court in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), in discussing the government's burden to show that the speech restriction directly and materially advances the asserted governmental interest stated:

> [We] have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales all together, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus and simply common-sense.

533 U.S. at 555.

This Court should affirm that the third prong of the *Central Hudson* test, as applied to signs and billboards in *Metromedia*, is unchanged. The parties agree the speech at issue in this case is protected commercial speech. Respondent agrees with the substantiality of Petitioner's asserted regulatory interests: traffic safety and aesthetics. The issue in this case is whether the ordinance satisfied the third prong of *Central Hudson*, i.e., whether it advanced the Village's substantial interests in a direct and material way. The majority below relied almost exclusively on this Court's opinion in *Edenfield v. Fane*, 507 U.S. 761 (1993). That case involved a Florida rule that prevented public accountants from engaging in direct, uninvited solicitation of potential clients. This Court concluded that there was not sufficient evidence that the restriction on speech advanced substantial governmental interests of fraud prevention and professional ethics. The majority below rejected Petitioner's common sense argument stating: "[T]he standard established by the Supreme Court depends neither on obviousness nor common sense. *Edenfield* requires *some* evidence to establish that a speech regulation addresses actual harms on some basis in fact."

The majority below went astray and ignored this Court's view that each commercial speech case is different, relying upon *Edenfield* and other cases where the government banned a specific, legal, commercial message to further a "paternalistic" social goal by keeping information from the public. *Ibanez v. Florida Dept. Of Business and Professional Regulation*, 512 U.S. 136 (1994); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

The majority's opinion below in essence holds these cases supercede the *Central Hudson* analysis in *Metromedia*

as applied to signs and billboards. However, this Court continues to apply *Central Hudson* as before, and the heightened scrutiny seized perceived by the majority below from this Court's cases after *Central Hudson* is unfounded. The Court's heightened scrutiny in *Edenfield* and similar cases is a reflection of this Court's longstanding suspicion of the need to keep people in the dark for paternalistic government reasons. Glendale's ordinance is not of the same character. It is not aimed at suppressing consumerism by banning speech about professional services, gambling, or alcoholic beverages. The ordinance is intended to do exactly what it states: regulate signs for aesthetic and safety purposes. The Court's reasoning in *Metromedia* demonstrates that the regulations materially advance these purposes.

Regulations that directly advance their purposes based upon "common sense", still satisfy the *Central Hudson* test. The majority below demands that Glendale present "actual evidence of harm". As the dissent pointed out, the majority confused sufficiency with necessity of evidence. Simply put, record evidence is not necessary in every case.

Perhaps, sensing the obvious common sense basis of Glendale's ordinance, the majority below required that even common sense be supported by some record evidence, stating: "Thus, even common sense decisions require some justification." The majority missed the point entirely. Neither common sense nor the accumulated wisdom of reasonable legislative judgments require record evidence. To underscore Respondent's point, the majority below stated: "While our task is not to suggest what sort of evidence might suffice in other cases, we observe that there are many types of evidence other than expensive or burdensome studies that would likely demonstrate that a restriction responds to a real, existing

problem rather than a hypothetical one." 492 F.3d at 773, fn 5. The majority failed to identify even a single example of the type of evidence it was requiring. The majority below's justification for requiring record evidence of common sense was that without such "evidence" it could not conclude whether Glendale's legislative decision "was animated by reasoned judgment and not hostility toward particular speech". 492 F.3d at 777. There was neither any evidence nor any argument by Respondent of any improper motive on the part of Glendale.

It is clear from this Court's decisions that it will accept reasonable inferences, anecdotal evidence and common sense. In *Central Hudson*, this Court accepted a reasonable inference from the actions of the affected utility company as sufficient evidence of "an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales." *Central Hudson*, 447 U.S. at 569. In *Edenfield*, when the Court found there were no studies, the Court searched for "any anecdotal evidence, either from Florida or another state, that validates the Board's suppositions" or "even Fane's own conduct." *Edenfield*, 507 U.S. at 771. Such evidence is still sufficient. *Florida Bar*, 515 U.S. at 626. In that case, this Court stated "consensus and simply common sense" were sufficient to support legislation reviewed under strict scrutiny. 515 U.S. at 628. "[V]alidity of restrictions on commercial speech should not be judged by standards more stringent than those applied to expressive conduct entitled to full First Amendment protection or to relevant time, place or manner restrictions." *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 429 (1993).

The connection between the ordinance and the advancement of traffic safety and aesthetics is clear on the face of the ordinance. Glendale not only wanted to prevent people from being in the street viewing cars for sale, but it also prohibited other conduct in the street related to motor vehicles such as cleaning or repairing the vehicles. Further, Glendale's interest in aesthetic values was equally clear on the face of the ordinance, and the majority's requirement of "evidence" to establish aesthetic values is puzzling to say the least. Certainly, Glendale, a National Historic Landmark, is concerned about the use of its roadways as used car lots or open air markets, just as it would be concerned about the proverbial car on blocks in a driveway or a broken refrigerator on the porch. As the dissent below noted, insisting on a study regarding aesthetics is particularly "pointless" given the essential subjective nature of aesthetics. See, Burt, *Speech Interests Inherent in the Location of Billboards and Signs: A Method for Unweaving the Tangled Web of Metromedia, Inc. v. City of San Diego*, 2006 B.Y.U. Law Rev. 473, 496, fn.112.

Contrary to the suggestion of the majority opinion below, the more recent commercial speech cases in this Court involving signs or billboards have not created a new standard for evaluating the government's evidence. None of this Court's recent decisions require detailed proof or expert testimony or studies where common sense and experience supply the necessary connection. A reasonable legislative judgment based on history, consensus or simple common sense satisfies the third prong of *Central Hudson*. As the dissent pointed out, there are more than 200 similar ordinances just within the four states comprising the Sixth Circuit.

The Sixth Circuit's decision impermissibly modifies this Court's holdings that common sense can justify the government's burden to show that an ordinance regulating commercial speech directly advances a substantial governmental interest. Any modification of this Court's holdings must be done by this Court.

B. By holding that record evidence is required to support common sense legislative judgments, the Sixth Circuit's decision is in conflict with the other federal circuit courts of appeal.

Respondent's counsel is unaware of any other circuit requiring record evidence of common sense, particularly in the application of the third prong of *Central Hudson* to the regulation of signs or billboards.

In *Ackerley Communications of the Northwest, Inc. v. Krochalis*, 108 F.3d 1095 (9th Cir. 1997), the plaintiff, and outdoor advertising business, sued the City of Seattle alleging that its ordinance limiting construction and relocation of billboards impermissibly restricted commercial speech under the First Amendment. The District Court held that no trial was necessary on whether the ordinance satisfied Central Hudson, rejecting plaintiff's argument that decisions of this court subsequent to *Metromedia* imposed a greater evidentiary burden on a municipality to justify a restriction on commercial speech. The Court of Appeals agreed with the District Court and specifically stated that *Metromedia* remains good law. The 9th Circuit rejected Plaintiff's argument that there must be record evidence to support the ordinance holding: "As a matter of law, Seattle's ordinance enacted to further the city's interests in esthetics and safety, is a constitutional restriction of commercial speech without

detailed proof that the billboard regulation will in fact advance the city's interests." 105 F.3d at 1099-1100. See, also, *Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu*, 455 F.3d 910 (9th Cir. 2006).

The 2nd Circuit in *Long Island Bd. Of Realtors, Inc. v. Village of Massapequa Park*, 277 F.3d 622 (2nd Cir. 2002), reviewed the *Central Hudson* test with reference to the Village's ordinance regulating the display of signs in residential districts. The Village advanced governmental interests of aesthetics and safety in support of the ordinance. Dealing with the third and fourth prongs of *Central Hudson* together, the Court of Appeals found that the Village had satisfied its burden of proof finding that: "On their face, such regulations directly advanced the Village's interests in esthetics and safety.", citing, *Metromedia* 453 U.S. at 508-12. The Court went on to observe that municipalities have "considerable leeway ... in determining the appropriate means to further a legitimate governmental interest, even when enactments incidently limit commercial speech.", citing *South-Suburban Hous. Ctr. v. Greater South-Suburban Bd. Of Realtors*, 935 F.2d 868, 897 (7th Cir. 1991).

Petitioners would also direct the Court's attention to the 4th Circuit's decision in *Anheuser -Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995). At issue was the City of Baltimore's ordinance prohibiting the placement of stationary outdoor advertising of alcoholic beverages in certain areas of the City. The City's substantial governmental interest in promoting the welfare and temperance of minors was conceded to be a substantial one. In discussing the application of the third prong of *Central Hudson*, the Court stated that its inquiry "seeks to elicit whether it was reasonable for the legislative body to conclude that its goal would be advanced

in some material respect by the regulation." 63 F.3d at 1313, citing *United States v. Edge Broadcasting Co.*, 509 U.S. 418. The 4th Circuit observed that this Court in *Edge* upheld Congress' "common sense judgment". The 4th Circuit also cited to *Metromedia* and notes this Court's approach to the third prong of *Central Hudson* that: ". . . the reviewing court may be satisfied with a legislative judgment is 'not unreasonable.'" 63 F.3d at 1314, citing *Metromedia*, 453 U.S. at 509.

See, also, *Lindsay v. City of San Antonio*, 821 F.2d 1103, 1110 (5th Cir. 1987) ("deference" should be accorded "to the judgment of the body charged with the responsibility of making determinations about esthetics."); *Lavey v. City of Two Rivers*, 171 F.3d 1110, 1115 (7th Cir. 1999) (the language and structure of the ordinance was designed to directly achieve the government's interests); *Advantage Media, LLC v. City of Eden Prairie*, 456 F.3d 793, 803 (8th Cir. 2006) (municipalities have "weighty" aesthetic interests regarding roadside signs and such signs "could" pose a danger to motorists and pedestrians); *National Advertising Co. v. City of Denver*, 912 F.2d 405, 409 (10th Cir. 1990).

The 6th Circuit's decision stands alone in requiring a municipality to provide record evidence of common sense when dealing the regulation of signs and billboards for purposes of traffic safety and aesthetics.

CONCLUSION

In his en banc brief below, Respondent urged the Sixth Circuit to recognize the "legacy of *Central Hudson*" is ". . . that speakers and listeners cannot be trusted to be left alone when they discuss conduct that is legal but happens to be commercial" and is a "blight on the First Amendment." Respondent asked the Sixth Circuit to ". . . urge the Supreme Court to recognize that the commercial speech doctrine undermines one of the First Amendment's core values." Although the Sixth Circuit did not go as far as urged by Respondent, it nonetheless eroded the principles set forth by this Court in *Metromedia* and *Central Hudson*, i.e., the common sense judgments of local lawmakers can establish that a law directly advances substantial governmental interests in traffic safety and aesthetics. The Sixth Circuit has separated itself from the other Circuits, as well as this Court, in holding that ". . . Even common sense decisions require some justification."

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JUNE 29, 2007

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-4414

CHRISTOPHER J. PAGAN,

Plaintiff-Appellant,

v.

POLICE CHIEF MATT FRUCHEY and THE VILLAGE OF GLENDALE, OHIO,

Defendants-Appellees.

Argued: Dec. 6, 2006
Decided and Filed: June 29, 2007

Before: BOGGS, Chief Judge; MARTIN, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, and GRIFFIN, Circuit Judges.

GIBBONS, J., delivered the opinion of the court, in which BOGGS, C.J., MARTIN, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, JJ., joined. ROGERS, J. (pp. 779-89), delivered a separate dissenting opinion, in which SILER, BATCHELDER, SUTTON, COOK, McKEAGUE, and GRIFFIN, JJ., joined.

Appendix A

OPINION

JULIA SMITH GIBBONS, Circuit Judge.

Plaintiff-appellant Christopher J. Pagan filed the instant suit against the Village of Glendale, Ohio ("Glendale" or "the Village") and Glendale Police Chief Matt Fruchey, alleging that section 76.06 of the Glendale Traffic Code constitutes an unconstitutional restriction on commercial speech in violation of the First Amendment. Following the parties' cross-motions for summary judgment, the district court determined that Glendale's ordinance complied with the requirements of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), and granted summary judgment in favor of the defendants. Because we conclude that the defendants have failed to produce evidence that justifies the restrictions on commercial speech imposed by the ordinance, we reverse the decision of the district court and remand for further proceedings consistent with this opinion.[1]

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1. The district court, in its order granting summary judgment in favor of the defendants, determined that Chief Fruchey was entitled to qualified immunity. Having failed to challenge this aspect of the district court's order in his briefing, Pagan has waived any argument that the district court's decision respecting Chief Fruchey was incorrect. *See, e.g., McCalvin v. Yukins*, 444 F.3d 713, 723 (6th Cir.2006) ("It is well established that issues not raised by an appellant in its opening brief ... are deemed waived."). Therefore, we need not review the merits of this aspect of the district court's decision.

Appendix A

I.

Pagan is a resident of Glendale and formerly the owner of a 1970 Mercury Cougar that he wanted to sell. After a classified advertisement elicited an inadequate response, Pagan posted a "For Sale" sign on the vehicle and left it parked on the public street in front of his residence. Pagan elected to place the car on the street instead of his driveway because his driveway abuts an unimproved alley and not a public roadway.

An officer with the Glendale Police Department noticed the sign, notified Pagan that the sign was a violation of Glendale Traffic Code § 76.06, and asked him to remove it or face being cited for a municipal violation. Section 76.06 reads as follows:

> It shall be unlawful for any person to stand or park any vehicle, motorized or towed, upon any public or private street, road, or highway within the village or upon any unimproved privately owned area within the village for the purpose of:
>
> > (A) Displaying it for sale, except that a homeowner may display a motor vehicle, motorized or towed, for sale only when owned and titled to said homeowner and/or a member of said household, and only when parked upon an improved driveway or apron upon the owner's private property;

(B) Washing, maintaining or repairing such vehicle except repairs necessitated by an emergency.

(C) Any advertising.

Pagan corresponded with various Glendale officials, including **Fruchey**, but was ultimately unsuccessful in obtaining a satisfactory resolution of his dispute with the Village. In order to avoid a citation, **Pagan** removed the sign from his vehicle.

Pagan subsequently filed this lawsuit against **Fruchey** and Glendale, alleging a violation of his constitutional rights and challenging subsections (A) and (C) of the ordinance. **Pagan's** original complaint contained requests both for injunctive relief and damages, but **Pagan** voluntarily withdrew his request for an injunction. Both before the district court and before us on appeal, **Pagan** has argued that subsections 76.06(A) and (C) constitute impermissible restrictions on his right to engage in protected commercial speech.[2] Following the parties' cross-motions for summary

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2. The dissent determines that Pagan has waived any claim that subsection (C) of the Glendale ordinance is unconstitutional. The subsection (C) claim was referred to in the complaint as an equal protection and due process claim. In his summary judgment motion Pagan withdrew his equal protection claim and said that Glendale's enforcement of the advertising prohibition contained in subsection (C) was better addressed as a part of his First Amendment claim. Although Pagan did not make further specific mention of subsection (C) in his briefing, we conclude that this does not amount to waiver (Cont'd)

judgment, the district court determined that section 76.06 was a constitutional regulation of commercial speech under the Supreme Court's *Central Hudson* framework and granted summary judgment to the defendants. Pagan subsequently appealed.

II.

This court reviews the grant of summary judgment *de novo*. *DiCarlo v. Potter*, 358 F.3d 408, 414 (6th Cir.2004). Summary judgment will be affirmed if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). If, on the other hand, "a reasonable jury could return a verdict for the non-moving party," summary judgment for the moving party is inappropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In reviewing the district court's decision, this court draws all justifiable inferences in favor of the non-

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(Cont'd)
under the circumstances present here. Pagan's overall claim is and has been that Glendale unconstitutionally limits the posting of "For Sale" signs on cars in the public streets. In any event, although the distinction between subsections (A) and (C) was the subject of considerable questioning at oral argument, the issue of whether the conduct for which Pagan seeks First Amendment protection is reached by subsection (A), subsection (C), or both, is ultimately not germane to the resolution of Pagan's "as applied" challenge-a circumstance that likely explains Pagan's failure to distinguish between the subsections in his briefing.

moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

While other forms of expression are entitled to more protection under the First Amendment than is commercial speech, *see, e.g., Republican Party of Minn. v. White*, 536 U.S. 765, 775, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) (noting that content-based restrictions on the political speech of candidates for office are subject to strict scrutiny), the protection provided to commercial speech is nevertheless considerable. The Supreme Court has outlined a four-part test that subjects restrictions on commercial speech to a form of intermediate scrutiny. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).[3] Under the first prong of the *Central Hudson* test, the commercial speech at issue must concern lawful activities and not be misleading, thus entitling it to First Amendment protection. 447 U.S. at 563-64, 100 S.Ct. 2343. If the speech is entitled to protection, the remaining prongs of the *Central Hudson* test provide the framework for determining the validity of the restriction. More specifically, a restriction on protected commercial speech will be upheld if the government "assert[s] a substantial interest in support of its regulation," "demonstrate[s] that the restriction on commercial speech directly and materially advances that interest[,]" and draws the regulation narrowly.

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3. Defendants do not concede that the ordinance is properly viewed as a restriction on commercial speech and make an alternative argument that it is properly analyzed as a content-neutral time, place, and manner restriction. We disagree and explain our reasoning in Part IV of this opinion.

Fla. Bar v. Went For It, Inc., 515 U.S. 618, 624, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995); *see also Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002). These requirements form the second, third, and fourth prongs of the *Central Hudson* test. On each point, the government bears the burden of establishing the constitutionality of its regulatory scheme. *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) (noting that "the State bears the burden of justifying its restrictions").

The parties agree that the speech at issue in this case, the posting of "For Sale" signs on cars, is protected commercial speech. Furthermore, Pagan takes no issue with the substantiality of Glendale's asserted regulatory interests: traffic/pedestrian safety and aesthetic concerns. Thus, the questions before us are whether Glendale has established (1) that the restriction directly and materially advances its regulatory interests and (2) that it has drawn the restriction narrowly.

A.

With respect to the third *Central Hudson* prong, whether the speech regulation advances the government's asserted interests in a direct and material way, the Supreme Court has further explained:

> Under *Central Hudson* . . . , the State must demonstrate that the challenged regulation advances the Government's interest in a direct and material way. That burden, we have explained, is

> not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.

Fla. Bar, 515 U.S. at 625-26, 115 S.Ct. 2371 (internal citations and quotation marks omitted); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001) (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993)). Thus, the government must come forward with some quantum of evidence, beyond its own belief in the necessity for regulation, that the harms it seeks to remedy are concrete and that its regulatory regime advances the stated goals. *See Edenfield*, 507 U.S. at 770-72, 113 S.Ct. 1792.

B.

Under the fourth *Central Hudson* prong, the relevant question is whether the speech restriction is narrowly tailored; that is, we must determine whether the speech restriction at issue is "more extensive than is necessary to serve [the asserted] interests." *Thompson*, 535 U.S. at 367, 122 S.Ct. 1497 (quoting *Cent. Hudson*, 447 U.S. at 566, 100 S.Ct. 2343). The tailoring inquiry does not require a "least restrictive means" analysis. *Lorillard Tobacco*, 533 U.S. at 556, 121 S.Ct. 2404. Instead, there must be a "reasonable fit between the legislature's ends and the means chosen to accomplish those ends, . . . a means narrowly tailored to achieve the desired objective." *Id.* (internal quotation marks

omitted). The tailoring prong allows the reviewing court to assure itself that the government has "carefully calculated the costs and benefits associated with the burden on speech imposed" by regulation. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) (internal quotation marks omitted).

III.

At the outset, we note appellees' suggestion that subsection (A) of the ordinance does not implicate the First Amendment because it prohibits the act of parking a vehicle on Glendale's roadways for the purpose of displaying it for sale. As a result, appellees contend, the ordinance regulates commercial activity and not speech. Under appellees' construction, a seller's chosen means of advertising a desire to sell (*e.g.*, posting a "For Sale" sign, placing a classified ad, advertising online, etc.) is irrelevant. The act of placing a car on the street for the purpose of displaying it for sale purportedly violates subsection (A). Appellees' argument on this point is not well taken. During argument, they conceded that Glendale has no interest in enforcing subsection (A), except in those instances where the potential seller has displayed a "For Sale" sign. Thus, even if we construed the literal language of subsection (A) as not implicating the First Amendment, Glendale concedes that it enforces the ordinance in a manner that does. In this case, subsections (A) and (C) reach the same conduct,[4] and we must determine whether or

4. To be sure, subsection (C) is broader than subsection (A) and doubtless reaches speech not prohibited by (A). As applied to Pagan's "For Sale" sign, however, both provisions prohibit its display.

not Glendale has constitutionally prohibited the posting of "For Sale" signs on cars parked in its streets.

A.

In arguing that appellees have not met their burden under the third *Central Hudson* prong, Pagan relies heavily on the Supreme Court's decision in *Edenfield v. Fane*, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). Pagan argues that the affidavit of Fruchey, the only evidence provided by the appellees in support of section 76.06, fails to discharge appellees' burden under *Edenfield*. We agree.

In *Edenfield*, Scott Fane, a CPA, challenged a Florida rule that prevented public accountants from engaging in direct, uninvited solicitation of potential clients. 507 U.S. at 763-64, 113 S.Ct. 1792. Applying *Central Hudson*, the Court first noted that the speech at issue was protected and that the government had articulated substantial interests to justify the speech restrictions at issue. *Id.* at 768-70, 113 S.Ct. 1792.

As to the third *Central Hudson* inquiry, the Court held that the state failed to carry its burden. According to the Court, while fraud prevention and professional ethics constitute substantial governmental interests, the absence of any evidence-statistical, anecdotal, or otherwise-to suggest that the speech at issue posed any threat of concrete harm to those interests caused the regulation to fail. *Id.* at 771-72, 113 S.Ct. 1792. The Court characterized the state's evidence as follows:

> The only suggestion that a ban on solicitation might help prevent fraud and overreaching or

> preserve CPA independence is the affidavit of Louis Dooner, which contains nothing more than a series of conclusory statements that add little if anything to the Board's original statement of its justifications.

Id. at 772, 113 S.Ct. 1792. In the absence of evidence of real harm, the state could not show that its speech restriction had any connection to furthering its asserted regulatory interests. *See id.* Thus, *Central Hudson* requires more from the government than bald assertions that a particular speech restriction serves its articulated interests.

Upon review of the record, it is clear that the evidence adduced by the appellees is insufficient to satisfy their burden under *Central Hudson.* The relevant portion of the Fruchey affidavit reads in its entirety as follows:

> The primary purpose of the Ordinance is to promote the goal of traffic safety within the Village of Glendale. The objective of the Ordinance is to prohibit attractions or activities which will induce people to come into the roadway who are not a part of normal vehicular or pedestrian traffic, such as individuals washing or repairing their cars which are parked on the street, or individuals who are looking over a motor vehicle which is displaying a for sale sign parked on the street. In addition . . . , the Ordinance also addresses aesthetic objectives of the Village of Glendale.

The Fruchey affidavit amounts to nothing more that a conclusory articulation of governmental interests. While it suffices for the second part of the *Central Hudson* test by identifying two substantial government interests, it fails to address the third prong at all: that is, how the particular restriction chosen by Glendale directly and materially advances those interests. Its reference to people in the roadway looking at cars displaying "For Sale" signs is most accurately characterized as simple conjecture by the police chief about something that might occur. Certainly, it is not evidence that "For Sale" signs on cars in streets pose any concrete harm to traffic or aesthetics or that the ordinance has any connection to the interests Glendale asserts. In fact, the Fruchey affidavit is of exactly the type deemed insufficient by the Supreme Court in *Edenfield.*

In addressing this issue, the district court incorrectly applied a deferential standard and ultimately held that Pagan had not pointed to anything in the record that would suggest that Glendale's belief that section 76.06 was needed to further its asserted interests was "unreasonable" or "palpably false." The court, relying upon *Railway Express Agency, Inc. v. New York,* 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949), improperly placed the burden on Pagan to demonstrate the unconstitutionality of the ordinance. *Railway Express* has no applicability in the present case. Decided over twenty-five years before the Supreme Court recognized that commercial speech is entitled to First Amendment protection, *Railway Express* examines the constitutionality of a City of New York ordinance prohibiting operation of advertising vehicles on the streets under the due process and equal protection clauses of the Fourteenth Amendment and applies

a rational basis test. The case is simply irrelevant in the context of intermediate scrutiny, to which we subject restrictions on commercial speech. *See, e.g., Fox,* 492 U.S. at 480, 109 S.Ct. 3028.

The issue before us is narrow in scope. This is not a question of the quality of the evidence supporting a speech regulation. It is the absence of any evidence of the need for regulation that is fatal to section 76.06. Appellees suggest that it would be difficult, expensive, and time-consuming to conduct studies and provide empirical evidence in support of section 76.06. However, the Supreme Court has made quite clear that the evidentiary requirement the state must meet under intermediate scrutiny does not prescribe the manner by which evidence must be gathered or the precise form that it must take.[5]

Instead of actual evidence of harm, appellees ask us to adopt a standard of "obviousness" or "common sense," under which we uphold a speech regulation in the absence of evidence of concrete harm so long as common sense clearly

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5. While our task is not to suggest what sort of evidence might suffice in other cases, we observe that there are many types of evidence other than expensive or burdensome studies that would likely demonstrate that a restriction responds to a real, existing problem rather than a hypothetical one. As the Supreme Court noted in *Florida Bar,* case law does not "require that empirical data come to us accompanied by a surfeit of background information." 515 U.S. at 628, 115 S.Ct. 2371. What is required is a showing of a "concrete, nonspeculative harm." *Id.* at 629, 115 S.Ct. 2371. Fruchey's affidavit is the sort of speculation that might just as well be offered by a person unconnected with the Village about the rationale for the ordinance.

indicates that a particular speech regulation will directly advance the government's asserted interest. The difficulty with this proposition, however, is that the standard established by the Supreme Court depends neither on obviousness nor common sense. *Edenfield* requires *some* evidence to establish that a speech regulation addresses actual harms with some basis in fact.[6]

The thrust of appellees' arguments is not that the Fruchey affidavit is the type of evidence required by *Edenfield* but rather that other Supreme Court authority relieves them from the obligation of meeting the *Edenfield* requirements as to how a governmental entity must meet its burden under *Central Hudson*. They present three versions of this general argument.

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6. In applying *Edenfield*, the Supreme Court has observed that there are situations in First Amendment contexts other than commercial speech where the articulated harm is so obvious that no evidence is required: "[I]n other First Amendment contexts, we have permitted litigants to justify speech restrictions ... based solely on history, consensus, and simple common sense." *Fla. Bar*, 515 U.S. at 628, 115 S.Ct. 2371 (citing *Burson v. Freeman*, 504 U.S. 191, 211, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992)).

However, the alleged harms recited by the appellees cannot be characterized as matters upon which there is longstanding consensus or upon which all can agree. Prospective buyers may be just as likely to exercise caution and avoid entering traffic when viewing cars parked in the street with "For Sale" signs as they are to enter the roadway, or owners may remove a car from the street for inspection, fearing inspecting buyers might wander into traffic. Also undercutting the notion that these harms derive from common sense and consensus is the likelihood that a "For Sale" sign a few feet off the street in a driveway creates a distraction as great as a "For Sale" sign in a street.

First, appellees say that even in the absence of evidence of concrete harm, we should defer to legislative judgments on matters of traffic safety and aesthetics. Appellees argue that *Metromedia v. City of San Diego,* 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), demands deferential review of speech regulations promulgated in vindication of traffic safety and aesthetic interests. In their view, because the Supreme Court found that San Diego's rule banning offsite billboard advertising—supported by both traffic safety and aesthetic concerns—was permissible under *Central Hudson,* the "For Sale" sign ban addressing the same concerns must also be permissible.

But *Metromedia* does not control the outcome of this case. After noting the difficulty of applying broad First Amendment principles to "unique forms of expression," *id.* at 500, 101 S.Ct. 2882, the *Metromedia* plurality stated, "[e]ach method of communicating ideas is a law unto itself and that law must reflect the differing natures, values, abuses and dangers of each method. We deal here with the law of billboards." *Id.* at 501, 101 S.Ct. 2882 (internal citations and quotation marks omitted). The plurality recited at some length the Court's many summary rulings upholding billboard restrictions, referred to the history of billboards, and generally emphasized the frequency with which governments had placed restrictions on billboards. The plurality ultimately concluded, "[w]e likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety." *Id.* at 509, 101 S.Ct. 2882. Thus, *Metromedia* looked to its own substitute for the sort of evidence *Edenfield* requires-the collective judgment

of many legislative and judicial decisionmakers. No similar substitute exists here.[7] The record before us demonstrates no comparable legislative or judicial history supporting the conclusion that restrictions placed on "For Sale" signs posted on vehicles address concrete harms or materially advance a governmental interest.[8]

The position advocated by the appellees assumes, without discussion, that billboards and "For Sale" signs posted on parked cars raise practically indistinguishable aesthetic and traffic safety issues. Appellees' analogy hardly strikes us as obvious. In fact, it appears to sidestep the ultimate issue: namely, whether or not the speech Glendale seeks to regulate poses the harms that all agree would justify regulation. If "For Sale" signs are a threat to the physical safety of Glendale's citizens or implicate aesthetic concerns,

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7. It bears noting that the dissent has done its own evidentiary research and identified a number of ordinances in other jurisdictions similar to that at issue here. Accepting *arguendo* that the existence of similar statutes would itself be sufficient to meet Glendale's burden, Glendale is the party responsible for accumulating this evidentiary record. A court's role is not to search for evidence that a party *could* have located and submitted but did not. Nor should a court base its decision on an evidentiary record of its own creation. In contrast to the dissent's approach, the *Metromedia* opinion bears no indication that the Court itself did research on legislative action. Rather, it appears that the judicial history of billboard regulation gave the Court information as to the legislative history.

8. Finally, even assuming *Metromedia* is applicable to this case, *Edenfield*-coming more than a decade later-must be read as a refinement of the *Central Hudson* framework relied upon in *Metromedia*. *Edenfield*, not *Metromedia*, requires the result here.

it seems no great burden to require Glendale to come forward with some evidence of the threat or the particular concerns. Our research has revealed only one other case, post-*Edenfield,* that has ruled on this precise issue, and that court arrived at a result identical to ours on the issue of the evidence required by *Edenfield. See Burkow v. City of Los Angeles,* 119 F.Supp.2d 1076, 1080-81 (C.D.Cal.2000).

Second, appellees say that *Edenfield* does not apply to all commercial speech cases but only to those dealing with advertising by professionals. This argument does not explicitly appear in appellees' brief but was mentioned at oral argument and is perhaps best viewed as a variation of their first argument that traffic safety and aesthetics are entitled to greater deference than other interests in analyzing commercial speech cases. While *Edenfield* involves advertising by accountants and has been applied in lawyer advertising cases, *see Fla. Bar,* 515 U.S. at 625-26, 115 S.Ct. 2371, nothing in *Edenfield* or any other Supreme Court precedent suggests that *Edenfield*'s applicability is limited in the manner suggested by appellees. Moreover, the Court's continued reliance on *Edenfield* and its requirement that the harms articulated by the state in support of a commercial speech not be merely conjectural or speculative belies any claim that *Edenfield* is confined to advertising by professionals. *See, e.g., Lorillard Tobacco,* 533 U.S. at 555, 121 S.Ct. 2404 (addressing state regulation of tobacco advertising); *Greater New Orleans Broad. Ass'n, Inc. v. United States,* 527 U.S. 173, 188, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999) (addressing FCC restrictions on advertising of legal gambling); *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 487, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995)

(addressing restrictions on the advertising of beverage alcohol content).

Third, appellees focus on the notion that less is required of a governmental entity when its interests are aesthetics. Appellees suggest that the invocation of aesthetic objectives carries with it some talismanic quality that, under case precedents, legitimizes all signage regulation and relieves them from making the showing required in *Edenfield.* Appellees direct our attention to *Members of the City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). They argue that *Vincent,* when read in conjunction with *Metromedia,* establishes that billboards and signs constitute visual blight and clutter that justify ameliorative regulation. *See Vincent,* 466 U.S. at 808-09, 104 S.Ct. 2118 ("It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.' The same is true of posted signs.") (quoting *Metromedia,* 453 U.S. at 510, 101 S.Ct. 2882). Under appellees' theory, they need not provide evidence that "For Sale" signs create aesthetic harm because the Court has accepted as a matter of course that signs and billboards may be considered a visual blight.

The appellees' view of *Vincent* overlooks several critical points. The Court in *Vincent* was not considering a restriction on commercial speech only and was not applying the *Central Hudson* test. Rather, the restrictions on posting signs in *Vincent* applied to all forms of speech and were truly content-neutral, unlike the ordinance here (which, as we discuss below, is not content-neutral). In this context, the Court recognized the legitimacy of aesthetics as a governmental

interest, a point with which we agree and Pagan does not contest. Looking to *Metromedia,* the Court then noted that signs as well as billboards could pose aesthetic harm. This is another point with which we have no disagreement. We differ from appellees, however, in believing that recognition of aesthetics as a substantial governmental interest tells us nothing about how to resolve this case. *Vincent* certainly does not suggest, either explicitly or implicitly, that, in examining restrictions on commercial speech, aesthetic interests are to be treated differently from other governmental interests. Also, *Vincent* gives us no instruction about application of the *Central Hudson* test, and it says nothing about the rule of *Edenfield,* decided some nine years later. In fact, the Court in *Vincent* does not specifically tell us what evidence Los Angeles presented about its interests or the concerns that prompted enactment of the ordinance. *Vincent,* then, to the extent that it is relevant, simply tells us that the Court has recognized that proven aesthetic interests may prompt restrictions on signs, a point that leads nowhere in the resolution of this case.

Appellees' argument about the special nature of aesthetic concerns does not address the more fundamental problem with appellees' aesthetic justification. As we have noted, as an abstract matter, aesthetic issues are appropriate considerations in developing speech regulations. The record before us does not, however, disclose what Glendale's aesthetic objectives are. Perhaps Glendale hopes to avoid unsightly signage cluttering neighborhood streets; perhaps Glendale seeks to avoid having its streets filled with vehicles that may often not be the sort of automobiles people would like to have parked on their neighborhood streets; perhaps

"For Sale" signs posted on cars are simply not in keeping with the character of Glendale's neighborhoods. There are various possibilities, but it is not the place of the reviewing court to supply hypothetical justifications for speech regulation. *Cf. Edenfield*, 507 U.S. at 768, 113 S.Ct. 1792 (noting that with respect to the second *Central Hudson* prong regarding the existence of substantial government interests, "[u]nlike rational-basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions.") (citing *Fox*, 492 U.S. at 480, 109 S.Ct. 3028).

Even if appellees' view of *Metromedia* and *Vincent* is closer to the mark than ours and whatever the evidentiary requirement may be to show that a particular medium of communication poses aesthetic harm, a reviewing court must, as a preliminary matter, be apprised of what the government's aesthetic motivations are. Glendale fails to supply even this rudimentary information, saying in the Fruchey affidavit only that the ordinance addresses unspecified "aesthetic objectives." This general assertion fails to identify Glendale's aesthetic concerns with "For Sale" signs. Certainly, it does not suffice to show concrete harms addressed by the ordinance or that the ordinance directly and materially advances the government interest, as required by the third prong of *Central Hudson*. While the dissent questions any requirement that would mandate a study before limiting speech in furtherance of undoubtedly *subjective* aesthetic aims, our decision imposes no such requirement. Assuming that the subjective nature of aesthetics requires that we give regulators a freer hand when examining restrictions on commercial speech, it seems no great burden to require, as a

threshold matter, that they offer something more specific than a bald assertion that the regulation reflects aesthetic considerations.

The dissent critiques our decision as "read[ing] into the First Amendment a requirement that governments go through pointless formalities before they enact ... commonsense rule[s]. . . ." We have no interest in preventing the adoption of common sense rules or requiring legislative bodies to engage in "pointless formalities." In contrast to those situations in which we apply rational basis review, the intermediate scrutiny we apply in the commercial speech context charges the government with the burden of justifying its chosen form of regulation. Thus, even common sense decisions require some justification. Otherwise, we have no basis for concluding that Glendale's legislative decision is animated by reasoned judgment and not hostility toward particular speech. Moreover, if the need for the regulation is as obvious as Glendale and the dissent believe it to be, it seems that Glendale should be ideally positioned to provide *some* evidence of the need for its regulation-a task that Glendale has been entirely unwilling to undertake.[9] We do

9. The dissent particularly notes *Jobe v. City of Catlettsburg*, 409 F.3d 261 (6th Cir.2005), in which our court analyzed a content-neutral "time, place, and manner restriction." In *Jobe*, we noted that upholding common sense explanations for ordinances like one prohibiting placing leaflets on vehicles does not require proof that the problem has occurred in the past or an "elaborate study of their present-day necessity," referencing particularly the age of the ordinance in question, enacted in 1952. We do not disagree with *Jobe*. But an ordinance's long tenure cannot excuse the need for some justification, even though that justification need not come in

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not hold Glendale's ordinance invalid because Glendale has failed to produce *sufficient* evidence. Rather, we simply cannot uphold the ordinance without *any* evidence at all to support the need for its enactment and simultaneously follow what we view to be the clear command of the Supreme Court.

One aspect of our decision the dissent appears to find particularly troubling is its belief that it will impose a severe burden on municipalities seeking to regulate signage that they believe raises legitimate and undeniably important traffic safety and aesthetic concerns. While we disagree that the burden is severe and instead believe it fairly easily met, we note that the fact that the First Amendment imposes a requirement of evidentiary justification upon a regulatory authority is not, in and of itself, a cause for dismay.

As previously stated, our decision today does not prescribe the manner by which municipalities must justify these sorts of ordinances. Instead, we simply conclude that we cannot discharge our obligation to scrutinize commercial speech restrictions if we deem sufficient the conjectural affidavit of Glendale's police chief that offers nothing more than a statement of what he believes to be Glendale's regulatory objectives. It is Glendale's obligation to provide *something* in support of its regulation, and we do not find

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the form of an "elaborate study" or a recitation of past problems. Here, our only evidence is speculation about why a local legislative body might have wanted such an ordinance. In *Jobe*, the ordinance drew justification from the town mayor's explanation of its current relevance, its placement in the city code, and the content of the neighboring ordinances.

ourselves free to hold that obligation has been discharged based on principles of *common sense* or *obviousness*, especially where, as here, all do not agree as to what is obvious or a matter of common sense. A judicial pronouncement that an ordinance is consistent with common sense hardly establishes that it is so.

B.

The district court did not specifically address tailoring, but Pagan argued before the trial court, as he does on appeal, that the regulatory means chosen by Glendale lack a reasonable fit to the regulatory ends. The district court did, however, note that Pagan's claims along these lines were nothing more than conclusory assertions regarding his own notions of a more reasonable regulatory scheme and that it was not the place of the courts to second-guess Glendale's decision regarding appropriate traffic ordinances.

While we need not reach the issue of tailoring because our decision regarding the third *Central Hudson* prong is dispositive in this case, it is important to note that, contrary to the district court's conclusion, the regulatory authority bears the burden of establishing a reasonable fit when regulating commercial speech. In the commercial speech context at least, our review will, to some extent, require examination of the means chosen by the government. The obligation rests with the government to establish that its regulation is "narrowly tailored" and that it has carefully calculated the costs and benefits of regulation. *See Discovery Network*, 507 U.S. at 417-18, 113 S.Ct. 1505; *see also Fox*, 492 U.S. at 480, 109 S.Ct. 3028.

Appendix A

IV.

Appellees also argue that we need not engage in an analysis under *Central Hudson* because the prohibition on parking a car on the streets of Glendale for the purpose of advertising is a content-neutral time, place, or manner regulation and should be analyzed under that framework. Although their brief does not specify whether this argument refers to subsection (A) or (C), or both, it is most naturally understood as relating to subsection (C), because subsection (A) contains its own implicit reference to content. If appellees were successful in characterizing the ordinance as content-neutral, our inquiry here would still be a form of intermediate scrutiny, focusing on whether the restriction is narrowly tailored to serve substantial government interests and leaves open ample alternative channels of communication. *See, e.g., Ward v. Rock Against Racism,* 491 U.S. 781, 790, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

The Glendale ordinance cannot be evaluated as a content-neutral restriction, however, because, as appellees conceded during oral argument, the restriction on advertising does depend on the content of the speech: namely, the ordinance, as construed by Glendale, draws a distinction between promotional speech and speech asserting belief or fact.[10] The Supreme Court has made clear that any regulation that requires reference to the content of speech to determine its

10. Specifically, appellees stated at argument, in response to questioning, that the ordinance would apply to both speech promoting a commercial transaction and speech promoting a political candidate but would not apply to speech declaring one's child to be an honor student or advocating readiness for the coming of Jesus.

applicability is inherently content-based. *Cf. Discovery Network*, 507 U.S. at 429, 113 S.Ct. 1505 ("Under the city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside. . . . Thus, by any commonsense understanding of the term, the ban in this case is 'content based.' "). Characterization of the ordinance as a content-neutral time, place, or manner restriction is simply inaccurate.

V.

For the foregoing reasons, we reverse the district court's grant of summary judgment and remand this cause for further proceedings consistent with this opinion.

ROGERS, J., dissenting.

The justification for forbidding the placement of for-sale automobiles on the public streets-for inspection by potential buyers—is simply obvious: people may be drawn to stand in the street for nontraffic purposes. The act of selling a car in a public street invites prospective buyers into the road to examine the car, and common sense supports a ban on such acts. To read into the First Amendment a requirement that governments go through pointless formalities before they enact such a commonsense rule is, in my view, to cheapen the grandeur of the First Amendment. To require a study, or testimony, or an affidavit, to demonstrate the obvious is to turn law into formalistic legalism. Nothing in Supreme Court precedent requires such a step.

Indeed, *Metromedia* strongly supports upholding the ordinance without any artificial record evidence requirement. *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 509, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981). In *Metromedia,* the Supreme Court, in a split opinion, invalidated a city's ban on off-site billboard advertising because of the extent to which the ban affected noncommercial speech. *Id.* at 512-21, 101 S.Ct. 2882 (plurality); *id.* at 521-40, 101 S.Ct. 2882 (Brennan, J., concurring in the judgment). Under the reasoning of a strong majority of the Court, however, the city's ban on off-site billboard advertising was determined to be constitutional to the extent that it regulated commercial speech. *Id.* at 503-12, 101 S.Ct. 2882 (plurality) (ban complies with First Amendment to extent it applies to commercial speech); *id.* at 541, 101 S.Ct. 2882 (Stevens, J., dissenting in part) (same); *id.* at 555-69, 101 S.Ct. 2882 (Burger, C.J., dissenting) (ban altogether constitutional); *id.* at 569-70, 101 S.Ct. 2882 (Rehnquist, J., dissenting) (same). While the reasoning of these various opinions differed, a *majority of five justices* adopted the reasoning of Justice White's plurality opinion with regard to the constitutionality of the billboard ban to the extent it dealt with *commercial speech.* Since the instant case deals exclusively with commercial speech, the portion of Justice White's opinion for four justices (i.e. Parts I-IV), joined also by Justice Stevens, 453 U.S. at 541, 101 S.Ct. 2882 (Stevens, J., dissenting in part), is directly controlling for this court. *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 540-41, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

That analysis directly supports upholding the ordinance in this case. The *Metromedia* Court majority determined that

the ban on commercial speech met each element of the *Central Hudson* test: (1) the speech did not involve unlawful activity and was not misleading, and thus was entitled to First Amendment protection; (2) the ban sought to implement a substantial government interest; (3) it directly advanced that interest; and (4) it reached no further than necessary to accomplish the given objective. 453 U.S. at 507-17, 101 S.Ct. 2882. The same result follows in this case. First, the speech does not involve unlawful activity and is not misleading. Second, the "substantial government interests" identified in *Metromedia,* traffic safety and appearance of the city, are remarkably close to those identified in this case, and Pagan concedes that the Village's asserted interests are "substantial."

The "more serious question" in *Metromedia,* as in this case, was the third criterion-whether the ordinance directly advanced the identified interests. The Court majority rejected an argument that the record was insufficient to establish a connection between billboards and traffic safety. 453 U.S. at 509, 101 S.Ct. 2882. Although the record was "meager" on this point, the California Supreme Court, taking into consideration the fact that "[billboards] are intended to, and undoubtedly do, divert a driver's attention from the roadway," had refused to strike down a reasonable legislative judgment regarding how to deal best with such distractions. *Id.* at 508-09, 101 S.Ct. 2882. The United States Supreme Court majority likewise held that San Diego could constitutionally ban commercial speech billboards, hesitating "to disagree with the accumulated, *commonsense judgments of local lawmakers* and of the many reviewing courts that billboards

are real and substantial hazards to traffic safety." *Id.* at 509, 101 S.Ct. 2882 (emphasis added). The majority concluded:

> There is nothing here to suggest that these judgments are unreasonable. As we said in a different context:
>
> We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false.

Id.

A closely parallel analysis is dispositive here. The commonsense judgment of Glendale's lawmakers is, if anything, far more compelling in this case. Simply put, exhibiting cars for sale on the public roadway may interfere with the dedication of such roadways to traffic and its necessary incidents. The ban on placing cars in the roadway for sale undoubtedly directly advances the Village's interest in traffic safety.

Noteworthy in the *Metromedia* Court majority's analysis is the total absence of reliance on record evidence to support its direct advancement rationale. This despite the *Metromedia* plaintiffs' assertion that the record was inadequate to support the ban on off-site billboard advertising and the Court majority's recognition that the California Supreme Court had

noted the meagerness of the record. Common sense prevailed in that case, and common sense even more strongly supports the conclusion that substantial interests are directly advanced in this case. Indeed, the Supreme Court recognized in *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 628, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995), that even in a First Amendment case applying strict scrutiny, restrictions may be justified "based solely on history, consensus, and 'simple common sense.' " (citing *Burson v. Freeman*, 504 U.S. 191, 211, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992)). *See also United States v. Edge Broadcasting Co.*, 509 U.S. 418, 428, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993) (upholding a ban on radio advertisements of lotteries in states where lotteries were illegal and, addressing *Central Hudson*'s third prong, stating that "Congress plainly made the commonsense judgment that each North Carolina station would have an audience in that State . . . and that enforcing the statutory restriction would insulate each station's listeners . . . and hence advance the governmental purpose of supporting North Carolina's laws against gambling"). Indeed, this court stated in *Jobe v. City of Catlettsburg*, 409 F.3d 261, 269 (6th Cir.2005), a case upholding against a First Amendment challenge an ordinance against placing leaflets on vehicles, that "[i]n view of the common-sense explanations for these types of laws, they do not invariably require proof that the problem has occurred in the past (a daunting task in view of the 1952 vintage of this law and the understandable absence of information about why the law was passed) or an elaborate study of their present-day necessity (an equally daunting task in view of the difficulty of showing the empirical necessity for a law that has been in place for more than 50 years)." Although the ordinance at issue in *Jobe* was analyzed as a content-

neutral "time, place, and manner" restriction, the analysis is substantially similar, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001), and the same considerations the court highlighted in *Jobe* are applicable here. *Metromedia* thus compels the conclusion that the ban on selling cars in the street "directly advances" the traffic safety interest in this case.

The majority in *Metromedia* relied in part on the large number of similar local laws throughout the country that had previously been upheld when subjected to constitutional attack. *Metromedia*, 453 U.S. at 509 n. 14, 101 S.Ct. 2882. Similarly in this case, Glendale is hardly alone in banning the placement of cars for sale in the public streets. Just within the four states comprising the Sixth Circuit alone there are more than 200 similar ordinances. *See* Appendix; *see, e.g.*, Flint, Mich., Code of Ordinances § 28-9 (1950); Michigan Uniform Traffic Code for Cities, Townships, and Villages R 28.1814, Rule 814 (2003); Louisville-Jefferson County, Ky., Code of Ordinances § 72.044 (1960); Toledo, Ohio, Municipal Code § 351.07 (1997); The Ohio Basic Code § 76.07 (2002); Memphis, Tenn., Code of Ordinances § 11-40-4 (1985). The large number of municipalities with similar ordinances "suggests that the policy behind them is premised on legitimate rather than contrived police-power concerns." *Jobe*, 409 F.3d at 269.

To be sure, the Supreme Court held in *Edenfield v. Fane*, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993), that a state may not constitutionally ban CPAs from direct contact with potential clients without demonstrating that harms may flow from such contact. Therefore, it is argued, a city may

not ban the exhibiting of automobiles for sale on the public streets without first demonstrating the unprotected harms that may flow from such conduct. With respect, such a legal inference falls of its own weight. The ban's effect on the harm addressed in the CPA case was not clearly established; in the present case it is compellingly obvious. The cases are flatly different on their face.

Nothing in our ironclad obligation to follow the holdings of the Supreme Court requires us to read *Edenfield* beyond the facts of the case to a set of facts that is meaningfully different. In *Edenfield,* the Court held that a single affidavit was insufficient to support a law banning in—person solicitation by CPAs. 507 U.S. at 771-72, 113 S.Ct. 1792. Although the Court determined in *Edenfield* that an affidavit was not sufficient, the Court also had before it a report contradicting the Florida Board of Accountancy's assertions regarding the supposed effects of CPA solicitation. *Id.* at 772, 113 S.Ct. 1792. It simply does not follow from *Edenfield* that Glendale is not free, without evidence or studies, to make a commonsense determination that allowing business to be conducted in the street presents certain hazards. *Edenfield* did not declare that, henceforth, any regulation of commercial speech must be accompanied by studies regarding the harm to be prevented, no matter how obvious that harm may be. Nor did *Edenfield* mark the death of common sense as a useful tool in the lawmaker's toolbox. *Edenfield* cannot be read to require a study or evidence of nonspeech harm any time a city wishes to remove from its roads distractions that are, by their nature, meant to draw pedestrians into the roadway.

Other cases are even less applicable.

Appendix A

In *Florida Bar v. Went for It,* 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995), the Supreme Court *upheld* a commercial speech ban prohibiting lawyers from sending direct-mail solicitations to victims of recent accidents or disasters, on the ground that the requirements of *Edenfield* were met given the existence of record evidence supporting the ban. *Id.* at 626-28, 115 S.Ct. 2371. The Court's reliance on the record evidence in *Florida Bar,* however, should not lead this court to mistake sufficiency for necessity, especially given that the Court also emphasized that previous litigants were successful in justifying speech restrictions "by reference to studies and anecdotes pertaining to different locales altogether . . . or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and simple common sense." *Id.* at 628, 115 S.Ct. 2371 (internal citations and quotation marks omitted). The judgment of the Supreme Court in *Florida Bar* is simply not a holding regarding what is required to meet the third prong of *Central Hudson,* but is rather a holding as to what is sufficient, and thus adds nothing to the requirements of *Edenfield.*

The Supreme Court in *Thompson v. Western States Medical Center,* 535 U.S. 357, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002), explicitly refrained from holding that the statutory provision at issue failed the third requirement of *Central Hudson.* The statutory provision at issue essentially provided that "as long as pharmacists do not advertise particular compounded drugs, they may sell compounded drugs without first undergoing safety and efficacy testing and obtaining FDA approval." 535 U.S. at 370, 122 S.Ct. 1497. Regarding whether the advertising ban directly advanced the Government's asserted interests related to non-FDA approved

compounded drugs, the Court reasoned that, "[a]ssuming it is true that drugs cannot be marketed on a large scale without advertising, the [statutory] prohibition on advertising compounded drugs *might indeed* 'directly advanc[e]' the Government's interests." *Id.* at 371, 122 S.Ct. 1497 (emphasis added). The Court proceeded to the final *Central Hudson* prong on the assumption that the third prong was met. *Id.* (Under that final prong, the fact that the restrictions were more extensive than necessary invalidated the provision: the Court identified numerous ways in which large-scale manufacturing of compounded drugs might be identified without using the proxy of commercial speech. *Id.* at 372, 122 S.Ct. 1497.)

In *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 556-61, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001), the Supreme Court held that a ban on advertising for smokeless tobacco or cigars within 1000 feet of a school *did* directly advance a substantial governmental interest under *Central Hudson*'s third step. As in *Florida Bar,* the government was able to point to record evidence in the form of studies to support its contention that the ban on commercial speech directly advanced its asserted interests. Again, however, the presence of studies in *Lorillard* merely establishes that such studies are sufficient, not that they are necessary, to pass muster under *Central Hudson*'s third prong. (As in *Thompson,* only lack of a "reasonable fit," the fourth *Central Hudson* inquiry, rendered the provision unconstitutional: the 1000-foot rule would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers in some geographical areas. *Id.* at 562, 100 S.Ct. 2343.)

In all of these cases, the only holding that the third step of *Central Hudson* was not met, in addition to *Edenfield,* was one aspect of the tobacco sales practices regulated in *Lorillard*: certain tobacco advertising could not be placed lower than five feet from the floor of any retail establishment within 1000 feet of a school. This failed the *Central Hudson* third step, not for lack of empirical evidence but because the five-foot rule "does not seem to advance th[e] goal" of preventing minors from using tobacco products. *Lorillard,* 533 U.S. at 566, 121 S.Ct. 2404. Children under five feet tall, the Court noted, can look up. In contrast, banning the placement of autos in the public streets for sales inspection more than "seems" to advance the goal of traffic safety, it obviously does so.

In short, the Court's holdings, and *Edenfield* in particular, do not require the conclusion that without record evidence, a regulation that so obviously advances a substantial interest is invalid. It is true that, as the Court majority stated in *Metromedia,* "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." 453 U.S. at 502, 101 S.Ct. 2882 (quoting *Kovacs v. Cooper,* 336 U.S. 77, 97, 69 S.Ct. 448, 93 L.Ed. 513 (1949)). We cannot however simply dismiss the Supreme Court's decision in *Metromedia* because the Court pointed out that it was dealing only with billboards. Indeed, the "natures, values, abuses and dangers" of selling cars in the streets are far closer to those of setting up billboards than they are to the direct solicitation of clients by CPAs. The "abuses and dangers" of billboard advertising are indeed very similar to the abuses and dangers of selling cars in the streets: traffic safety concerns and visual

aesthetics. The abuses and dangers of direct solicitation by CPAs are entirely distinct: avoiding fraud and maintaining CPA ethics. Thus any argument that a particular Supreme Court holding does not apply because of the differences in methods of communicating ideas would require us to disregard *Edenfield* long before it would require us to disregard *Metromedia.* We should disregard neither, but apply each to the extent its reasoning controls on facts meaningfully similar to those in this case.

Of course if the two cases conflict, then *Edenfield* would control on the theory that the Supreme Court has to that extent overruled *Metromedia.* We should not rush to that conclusion, however, where there is a meaningful distinction between the two cases. With respect to the third prong of *Central Hudson,* the distinction between the ordinance in *Metromedia* and the statute in *Edenfield* is stark: there is obvious "direct advancement" in *Metromedia* and nothing of the sort in *Edenfield.* Accordingly, while the First Amendment requires record evidence in *Edenfield,* it does not in *Metromedia.* The distinction cuts squarely in favor of Glendale in this case. It is not up to us to overrule *Metromedia,* and *Edenfield* did not do so, either explicitly or *sub silentio.*

Finally, Glendale's ordinance also clearly passes *Central Hudson*'s fourth prong. The ordinance is not more extensive than necessary to serve Glendale's asserted interests in traffic safety. "The least restrictive means test has no role in the commercial speech context." *Florida Bar,* 515 U.S. at 632, 115 S.Ct. 2371 (internal quotation marks omitted). Glendale need only demonstrate that there is a fit between its ordinance and the ends it seeks to achieve. *Id.*

The ordinance exactly serves Glendale's purposes. Although it is true that cars parked in a private driveway fronting a public street may also prove distracting, it is not true that such activity invites people into the roadway for purposes of inspecting the car that has been advertised for sale. Glendale has properly limited the reach of the ordinance to public property; Glendale could reasonably conclude that the dangers attendant to placing a car for sale in a public street outweigh any harm that may occur when a property owner decides to place an automobile for sale on his own property. *Cf. Metromedia,* 453 U.S. at 490, 101 S.Ct. 2882 ("[T]he city may believe that offsite advertising . . . presents a more acute problem than does onsite advertising."). Indeed, given Glendale's interests in ensuring that individuals remain out of the roadway, it makes eminent sense to limit the reach of the ordinance to cars parked on public streets. While it is true that "numerous and obvious less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable," *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n. 13, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993), the only apparent alternative for Glendale is to outlaw pedestrians' presence in a roadway to inspect a vehicle. Of course, this does nothing to eliminate the very enticement that may lead prospective buyers into the roadway in the first place and does nothing to prevent driver distraction.

Because Glendale has crafted an ordinance that goes no further than necessary to address a substantial public concern, the judgment of the district court should be affirmed.

It is accordingly not necessary to rely in addition on Glendale's asserted aesthetic interests, and I treat them only briefly here. Those interests appear independently sufficient to support the restriction on commercial speech in this case. A majority of seven Justices in *Metromedia* concluded that San Diego's aesthetic interests were sufficient to support San Diego's ordinance to the extent that it regulated commercial speech. *Metromedia,* 453 U.S. at 510, 101 S.Ct. 2882 (plurality); *id.* at 552, 101 S.Ct. 2882 (Stevens, J., dissenting in part); *id.* at 559-61, 101 S.Ct. 2882 (Burger, C.J., dissenting); *id.* at 570, 101 S.Ct. 2882 (Rehnquist, J., dissenting). As with respect to San Diego's regulation of commercial billboards, Glendale should not be required to come forward with studies to support its conclusion that city aesthetics would be improved by avoiding the transformation of public streets into used car lots or open-air markets. In a less obvious case, the Supreme Court, relying on *Metromedia*'s treatment of an aesthetics interest, upheld a Los Angeles ban on posting signs on public property such as utility poles. *Members of the City Coun. of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 805-807, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). "It is well settled that the state may legitimately exercise its police powers to advance esthetic values." *Id.* at 805, 104 S.Ct. 2118. Without reliance on empirical evidence in the record, the Court reasoned that

> The problem addressed by this ordinance-the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property-constitutes a significant substantive evil within the City's power to prohibit. "[The] city's interest in attempting to

> preserve [or improve] the quality of urban life is one that must be accorded high respect."

Id. at 808, 104 S.Ct. 2118 (citations omitted). A similar conclusion without record evidence is warranted here with respect to cars placed for sale on city streets. Indeed, insisting on a study regarding aesthetics would be particularly pointless given the essentially subjective nature of the topic. The *Vincent* Court also held that the Los Angeles posting ban was not unconstitutionally broad:

> By banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy. The plurality wrote in *Metromedia*: "It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.' " 453 U.S., at 510 [101 S.Ct. 2882]. The same is true of posted signs.

Id. at 808, 104 S.Ct. 2118. The same can be said of cars placed for sale on city streets.

Finally, I do not address the constitutionality of subsection (C) of the Glendale ordinance. Pagan initially challenged this portion of the ordinance, which prohibits placing vehicles in the road for the purposes of any advertising, as a violation of the Equal Protection and Due Process Clauses of the United States Constitution. However, Pagan withdrew this claim for relief in his motion for summary judgment in the district court, choosing to argue instead that Glendale's failure to regulate other kinds of signs

or to fully enforce the ordinance's ban on advertising undermined Glendale's asserted interest in traffic safety with respect to subsection (A). Thus, Pagan expressly limited any consideration of subsection (C) to whether a failure to enforce that subsection undermined Glendale's arguments about the constitutionality of subsection (A). Given that Pagan himself failed to argue the constitutionality of subsection (C) below, the issue was waived and I have no occasion to address whether subsection (C) violates the First Amendment, *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1172 (6th Cir.1996), or whether, in the absence of any allegation that Pagan intends to engage in activity that violates subsection (C) without violating (A), he would have standing to assert a First Amendment challenge to subsection (C), *see Prime Media, Inc. v. City of Brentwood*, 474 F.3d 332, 340 (6th Cir.2007).

I respectfully dissent.

Appendix A

APPENDIX

Ordinances Forbidding the Placement of Cars for Sale in the Public Streets

Kentucky

Alexandria, Code of Ordinances § 72.11 (1988)

Ashland, Code of Ordinances § 72.004 (1983)

Augusta, Code of Ordinances § 72.11

Berea, Code of Ordinances § 40.304 (1946)

Bowling Green, Code of Ordinances § 22-4.09 (2001)

Cadiz, Code of Ordinances § 72.11

Cold Spring, Code of Ordinances § 71.04 (1997)

Covington, Code of Ordinances § 75.08 (1967)

Crescent Springs, Code of Ordinances § 72.11

Crestview Hills, Code of Ordinances § 72.11

Danville, Code of Ordinances § 17-35 (1977)

Edgewood, Code of Ordinances § 72.11

Flemingsburg, Code of Ordinances § 72.11

Fort Mitchell, Code of Ordinances § 72.11 (1988)

Fort Thomas, Code of Ordinances § 72.15 (1983)

Fort Wright, Code of Ordinances § 72.11

Hillview, Code of Ordinances § 72.11 (1984)

Louisville-Jefferson County, Code of Ordinances § 72.044 (1960)

Appendix A

Madisonville, Code of Ordinances § 72.11

Pikeville, Code of Ordinances § 72.010

Walton, Code of Ordinances § 72.11

Warsaw, Code of Ordinances § 72.11

Michigan

Bingham Farms, Code of Ordinances § 95.10 (2005)

Burton, Code of Ordinances § 71.02

Clinton Township, Code of Ordinances §§ 886.10; 886.11 (1986)

Eastpointe, Code of Ordinances § 480.05 (1988)

Flint, § 28-9 (1950)

Howell, § 430.05

Marshall, § 73.18 (1992)

Mason, § 8.14

Saginaw, Code of Ordinances § 72.22 (1959)

Uniform Traffic Code for Cities, Townships, and Villages, R 28.1814 Rule 814 (2003)

Appendix A

Ohio

Ada, § 351.06

Amherst, § 351.07 (1980)

Avon, § 452.08

Avon Lake, § 452.08

Bay Village, § 351.06

Bedford, § 351.06

Bedford Heights, § 351.06 (1970)

Bellbrook, § 452.08

Bellvue, § 351.06 (2002)

Belpre, § 351.06

Berea, § 751.05 (1988)

Blue Ash, § 351.06

Bowling Green, § 76.09(1965)

Bratenahl, § 351.06 (1960)

Broadview Heights, § 452.08 (1976)

Brook Park, § 351.06

Brunswick, § 452.06

Bryan, § 351.06

Canal Winchester, § 351.06

Carey, § 351.06

Carlisle, § 452.08

Chagrin Falls, § 351.06

Cheviot, § 76.18 (1998)

Circleville, § 351.06

Cleveland Heights, § 351.06

Clyde, § 351.06

Conneaut, § 351.06

Cortland, § 351.06

Cuyahoga Heights, § 452.09

Defiance, § 351.06

Delaware, § 351.06 (1967)

Delphos, § 351.06

Dover, § 351.06 (1966)

Dublin, § 76.04 (1980)

East Palestine, § 452.12 (1956)

Elyria, § 351.06 (1945)

Englewood, § 452.08

Euclid, § 351.08

Evendale, § 452.08 (1952)

Fairfield, § 351.06

Findlay, § 351.06

Forest Park, § 73.12 (1961)

Appendix A

Franklin, § 351.06
Fremont, § 351.06
Gahanna, § 351.06
Gates Mills, § 352.08
Geneva, § 452.08
Glenwillow, § 351.06
Green, § 452.08
Greenhills, § 351.06
Greenville, § 452.08 (1960)
Greenwich, § 452.08
Grove City, § 351.06
Groveport, § 351.06
Hamilton, § 351.06
Harrison, § 351.06
Hicksville, § 351.09
Highland Heights, § 351.06
Highland Hills, § 351.06
Hilliard, § 351.06
Hunting Valley, § 351.01
Independence, § 351.09 (1958)
Johnstown, § 351.06
Lakewood, § 351.16 (2001)
Lancaster, § 351.06
Lebanon, § 351.06
Lexington, § 351.06
London, § 452.09 (1998)
Lorain, § 351.06
Lordstown, § 351.06
Louisville, § 351.06
Loveland, § 351.06
Lyndhurst, § 452.08
Macedonia, § 351.06
Mansfield, § 351.06
Maple Heights, § 452.08 (1967)
Marble Cliff, § 351.06
Marietta, § 351.06
Massillon, § 351.06
Mayfield Heights, § 351.08
Mayfield Village, § 351.06
Mason, § 351.06
Maumee, § 351.06
Medina, § 351.06
Mentor-on-the-Lake, § 452.08
Middlefield, § 351.06
Milan, § 351.06
Monroeville, § 351.06 (1978)

Appendix A

Montpelier, § 351.06
Mount Gilead, § 351.06
Mount Vernon, § 351.06 (1988)
Munroe Falls, § 351.06
New Albany, § 351.06
New Lebanon, § 73.06 (1980)
Niles, § 351.06
North Canton, § 351.06
North Perry, § 351.06
North Ridgeville, § 452.08
North Royalton, § 452.08
Norton, § 452.09 (1968)
Norwalk, § 351.06
Oberlin, § 351.06 (1957)
Ontario, § 351.06
Orange, § 351.06
Orville, § 351.06
Ottawa, § 351.06
Painesville, § 351.06
Parma, § 351.06 (1997)
Perrysburg, § 452.08 (1964)
Powell, § 351.06
Reading, § 452.08 (1982)
Reminderville, § 351.06 (1990)
Reynoldsburg, § 351.06
Richmond Heights, § 351.06
Riverlea, § 76.07
Rossford, § 351.06 (1966)
St. Bernard, § 351.15
St. Mary's, § 351.06
Sandusky, § 351.06
Shelby, § 452.09
Sidney, § 351.09
Silverton, § 76.16 (1954)
Solon, § 452.08
South Euclid, § 351.06
Springboro, § 452.08
Streetsboro, § 351.06
Strongsville, § 452.08 (2000)
Stow, § 351.06
Summit County, § 351.06
Tallmadge, § 351.06
Tiffin, § 351.06
Tipp City, § 76.07 (1974)
Toledo, § 351.07 (1997)
Troy, § 351.06

Appendix A

Twinsburg, § 351.06 (1958)
University Heights, § 452.09
Upper Sandusky, § 351.06
Valley View, § 452.09 (1965)
Vandalia, § 452.09
Van Wert, § 76.07 (1981)
Vermilion, § 452.08
Walton Hills, § 452.09 (1969)
Wapakoneta, § 452.08
Warren, § 351.06
Warrensville Heights, § 351.12
Waynesville, § 76.08 (1982)
Wellington, § 351.06
Westerville, § 351.06
Westfield Center, § 452.09
Wickliffe, § 351.06
Willoughby, § 452.09 (1971)
Willowick, § 351.06
Wilmington, § 351.06
Woodmere, § 351.06
Woodville, § 351.06
Wooster, § 351.06
Worthington, § 351.06
Youngstown, § 351.06
The Ohio Basic Code, § 76.07 (2002)

Appendix A

Tennessee

Alcoa, § 15-220(6) (1971)

Arlington, § 15-404 (1997)

Belle Meade, § 15-601 (1987)

Bolivar, § 15-1504 (1976)

Brentwood, § 66-293

Bristol, § 70-203 (2006)

Chattanooga, § 24-293 (1986)

Cleveland, § 15-610 (1981)

Clinton, § 15-601(3)(h) (1969)

Farragut, § 15-110

Germantown, § 20-212 (1986)

Johnson City, § 15-1108 (1985)

Knox County, § 62-189 (1991)

Knoxville, § 17-291 (1962)

McMinnville, § 15-505 (1982)

Memphis, § 11-40-4 (1967)

Morristown, § 15-809 (1979)

Nashville, § 12.40.150

Oak Ridge, § 15-609 (1969)

Red Bank, § 15-601 (1975)

Sevierville, § 15-603 (1987)

Shelby County, § 20-86 (1992)

Signal Mountain, § 15-706 (1985)

Sparta, § 15-605 (1997)

Winchester, § 15-820 (1983)

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MAY 19, 2006

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-4414

CHRISTOPHER J. PAGAN,

Plaintiff-Appellant,

v.

POLICE CHIEF MATT FRUCHEY, and VILLAGE OF GLENDALE, OHIO,

Defendants-Appellees.

November 29, 2005, Submitted
May 19, 2006, Decided
May 19, 2006, Filed

JUDGES: Before: SILER and GRIFFIN, Circuit Judges; TARNOW, District Judge.* GRIFFIN, J., delivered the opinion of the court, in which SILER, J., joined. TARNOW, D. J., delivered a separate dissenting opinion.

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* The Honorable Arthur J. Tarnow, United States District Judge for the Eastern District of Michigan, sitting by designation.

Appendix B

OPINION BY: GRIFFIN OPINION:

GRIFFIN, Circuit Judge. Christopher J. Pagan appeals the entry of a summary judgment in district court dismissing his action against the Village of Glendale ("Village") and Police Chief Matt Fruchey ("Chief Fruchey"). Pagan's claims arose out of a Village ordinance proscribing a resident's ability to display a for-sale sign on a vehicle parked on a public street. Pagan contends the Village ordinance unconstitutionally infringes on his First Amendment right to display a vehicle for-sale sign in the public street. We disagree and affirm.

I.

The facts giving rise to this case are not in dispute. Pagan is a resident of the Village of Glendale, Ohio, and a practicing lawyer in Middleton. He was given a blue 1970 Mercury Cougar as partial payment for his work on a case and hoped to sell it for its $3,000 appraised value. Attempts to sell the vehicle through a local newspaper and a classic car website failed, and, as a result, Pagan placed a sign on the vehicle and parked it on a public road in front of his home some time in July 2003.

On or around July 21, 2003, a Village police officer noted the sign and informed Pagan that it was illegal pursuant to Village ordinance § 76.06 (hereinafter "the Ordinance" or "§ 76.06"). In response, Pagan sent an email to Chief Fruchey requesting a copy of the Ordinance and noting that, in his opinion, the Ordinance could be a violation of his First

Amendment rights. Chief Fruchey then personally investigated the matter, confirmed that Pagan's car was parked in violation of § 76.06, and left a copy of the Ordinance with Pagan's wife. Section 76.06 of the Glendale Traffic Code provides as follows:

> It shall be unlawful for any person to stand or park any vehicle, motorized or towed, upon any public or private street, road, or highway within the village or upon any unimproved privately owned area within the village for the purpose of:
>
> > (A) Displaying it for sale, except that a homeowner may display a motor vehicle, motorized or towed, for sale only when owned and titled to said homeowner and/or a member of said household, and only when parked upon an improved driveway or apron upon the owner's private property.
> >
> > (B) Washing, maintaining or repairing such vehicle except repairs necessitated by an emergency.
> >
> > (C) Any advertising.

On or around July 23, 2003, Pagan sent another email to Chief Fruchey proposing that the Village allow him to leave the for-sale sign on his car for an additional three weeks. Pagan indicated that, should the Village be amenable to his proposal, he would refrain from filing suit in federal court

seeking to have the Ordinance declared unconstitutional. One day later, Chief Fruchey declined Pagan's offer, via email, and informed him that a citation would issue unless Pagan complied with the Ordinance. Pagan thereafter removed the for-sale sign and, as a result, did not receive a citation.

Pagan filed suit in the Southern District of Ohio on July 30, 2003, naming Chief Fruchey and the Village as defendants. In his complaint, Pagan asserted that (1) the Ordinance violated his First Amendment constitutional rights, (2) the Ordinance violated his rights pursuant to the equal protection and due process clauses of the Constitution, and (3) the Village and Chief Fruchey's actions deprived Pagan of certain rights in violation of 42 U.S.C. § 1983. Finally, Pagan sought a declaration from the court that the Ordinance is unconstitutional and requested, *inter alia*, injunctive relief and $5,000 of compensatory damages.

The parties then filed cross-motions for summary judgment. Pagan's motion withdrew his request for injunctive relief and narrowed his constitutional claim solely to whether the Ordinance violated his First Amendment rights.[1] In response, the district court issued an order dated September 30, 2004, granting the Village's motion for summary judgment and finding the Ordinance constitutional. In doing so, the court, as a preliminary matter, found that Pagan possessed standing to challenge the Ordinance despite the fact that he was not cited. The court specifically stated that

1. Pagan further argued that Chief Fruchey was not immune from Pagan's § 1983 claims. The district court noted that such an argument "borders on frivolity" and dismissed it. Pagan does not renew his § 1983 arguments on appeal.

"[w]hile the potential monetary loss here appears to be relatively minor, a threatened fine of not more than $100 plus a possible invasion of First Amendment rights are clearly a 'cognizable injury.'"

The court thereafter substantively analyzed the constitutionality of § 76.06. At the outset, the court found that because Pagan's claims involved "commercial speech," the Supreme Court's decision in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980), set forth the appropriate legal framework. As the court noted, *Central Hudson* sets forth a four-part test wherein a court must determine: (1) whether the expression is protected by the First Amendment, (2) the governmental interest for regulating speech, (3) whether the regulation directly advances the governmental interest asserted, and (4) whether the regulation is not more extensive than is necessary to serve the governmental interest. With that test in mind, the court noted that the first two *Central Hudson* steps were not in dispute; indeed, the parties agree that the for-sale sign constitutes commercial speech and the sign is a lawful activity that is not misleading. Accordingly, the court moved on to evaluating Pagan's for-sale sign in the context of the final two *Central Hudson* factors.

The court preliminarily observed that the Village asserted that it promulgated the Ordinance to promote traffic safety and prevent people from being in public roads unless they are part of the traffic flow. The court likewise noted that, as a secondary concern, the Village Ordinance sought to promote aesthetic objectives. Although Pagan conceded below that

traffic safety is a substantial governmental interest, he nonetheless asserted that the Village's evidence does not reflect that the Ordinance furthers that interest. In particular, Pagan asserted that Chief Fruchey's affidavit was not sufficient to carry the Village's burden. The court, in response, disagreed and stated that "[i]t seems self-evident that Traffic Ordinances in general, and the Glendale Ordinance in particular, are directly related to traffic control and safety. This Ordinance undoubtedly advances those interests by trying to keep people out of busy streets."

Pagan nonetheless further contended that vehicle for-sale signs do not pose an actual traffic safety problem. For support, Pagan noted the Village's failure to adduce extrinsic evidence in the form of, for example, traffic studies to support its conclusion and its further failure to regulate home for-sale signs and the like which may also pose traffic safety problems. Again, however, the court was not persuaded; "[t]he fact that Plaintiff may believe that the ordinance does not go far enough or fails to regulate other types of 'dangers' to traffic control or safety is irrelevant to the constitutional analysis of the ordinance."

Moreover, the court observed, it is not the role of a court to second-guess the Village's decision regarding appropriate traffic safety ordinances. Thus, given that Pagan offered "nothing more than his own speculation and subjective conclusions to argue that Glendale's legislative judgment is unreasonable, or even palpably false[,]" the court upheld the Ordinance as constitutional.

This appeal followed.

II.

We review the district court's entry of summary judgment de novo. *McWane, Inc. v. Fid. & Deposit Co. of Md.*, 372 F.3d 798, 802 (6th Cir. 2004). Summary judgment is proper when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law: FED. R. CIV. P. 56(c). A genuine issue for trial exists only when there is sufficient "evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (noting that, in deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the non-moving party).[2]

III.

Pagan argues that the district court improperly excused the Village from setting forth any evidence to demonstrate that the Ordinance actually furthers a significant governmental interest. Moreover, Pagan contends, the district court failed to appreciate the significance of the Village's failure to prohibit signs other than for-sale signs. Thus, Pagan concludes, "there is no evidence that vehicle and pedestrian safety has ever been jeopardized by vehicle for-sale signs,

2. On appeal, the Village does not raise the potential issues of lack of standing (Pagan did not receive a citation) or mootness (Pagen has now sold the vehicle). We choose to address only the issues that have been preserved and argued.

[and as a result] any harm is merely hypothetical, and cannot be relied upon to burden truthful speech."

As Pagan's arguments reflect, the heart of this appeal presents the question, pursuant to *Central Hudson*, of whether the Ordinance "directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."[3] 447 U.S. at 566. Commercial speech is properly restricted if the government (1) asserts a substantial interest "in support of its regulation," (2) "demonstrate[s] that the restriction on commercial speech directly and materially advances that interest[,]" and (3) draws the regulation narrowly. *Capobianco v. Summers*, 377 F.3d 559, 562 (6th Cir. 2004) (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 624, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995)).

Pursuant to the foregoing standards, the Village's Ordinance is constitutional. First, the Village has asserted two independent substantial interests; namely, traffic safety and aesthetics. We have previously recognized that traffic safety is a substantial interest in support of regulating the placement of signs nearby roadways. *See Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814, 823 (6th Cir. 2005) ("[B]illboard regulations, whatever other strengths and weaknesses they may have, advance a police power interest

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3. Notably, the "framework for analyzing regulations of commercial speech [] is 'substantially similar' to the test for time, place, and manner restrictions." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001) (quoting *Board of Trustees v. Fox*, 492 U.S. 469, 477, 106 L. Ed. 2d 388, 109 S. Ct. 3028 (1989)).

in curbing community blight and in promoting traffic safety." (citations omitted)); *accord Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508-09, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981) ("Nor can there be substantial doubt that the twin goals that the ordinance seeks to further — traffic safety and the appearance of the city — are substantial governmental goals."). We have also specifically approved of aesthetics as a substantial interest in regulating commercial speech. *See Rzadkowolski v. Village of Lake Orion*, 845 F.2d 653, 655 (6th Cir. 1988) (holding that regulations restricting billboards to an industrial district and permitting only on-premises signs in the business district "promote significant and legitimate aesthetic interests which enhance property values and psychological well-being for individuals and families"). Accordingly, the Village's asserted interests in regulating the placement of for-sale signs in automobiles parked in public streets are valid.

Second, the Village has demonstrated that the restriction on commercial speech directly and materially advances its asserted governmental interests. The Affidavit of Chief Fruchey explains that "[t]he objective of the Ordinance is to prohibit attractions or activities which will induce people to come into the roadway who are not a part of normal vehicular or pedestrian traffic, such as individuals washing or repairing their cars which are parked on the street, or individuals who are looking over a motor vehicle which is displaying a for sale sign parked on the street." By eliminating an individual's ability to advertise, wash their car, or display a for-sale sign on a public street, the Ordinance directly promotes traffic safety.

Pagan nonetheless argues that the Village presented insufficient evidence to demonstrate that the Ordinance promotes public safety. The Supreme Court has, however, previously made clear that "[i]f the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them." *Metromedia*, 453 U.S. at 508. It is self-evident that the same rationale applies to a for-sale sign like the one at issue here. *Accord Wheeler v. Comm'r of Highways*, 822 F.2d 586, 595 (6th Cir. 1987) ("Although the record in the present case contains little evidence regarding Kentucky's interests in traffic safety, we conclude that the interest in promoting the recreational value of public travel and preserving natural beauty along interstate highways is substantial and sufficient to support the content neutral restrictions.").

The final remaining question is whether the Ordinance is not more extensive than is necessary to serve the asserted governmental interest. "[A] regulation is not more extensive than necessary when it is a reasonable fit between the ends directly advanced by the statute and the means chosen as embodied in the regulation." *Discovery Network, Inc. v. Cincinnati*, 946 F.2d 464, 467 (6th Cir. 1991) (citing *Board of Trustees v. Fox*, 492 U.S. 469, 480, 106 L. Ed. 2d 388, 109 S. Ct. 3028 (1989)), *affd*, 507 U.S. 410, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993). This does not require that the means chosen be the least restrictive means. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556, 121 S. Ct, 2404, 150 L. Ed. 2d 532 (2001). "The degree to which speech is suppressed — or alternative avenues for speech remain available — under

a particular regulatory scheme tends to be case specific." *Id.* at 563 (citation omitted).

In this case, it bears noting that, because the Ordinance is designed to regulate potential safety hazards — persons occupying the roadway and distracted motorists — § 76.06 has only an incidental impact on speech.[4] *Cf. City of Ladue v. Gilleo*, 512 U.S. 43, 48, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994) ("Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation."). Perhaps more importantly, several alternative channels of speech remain available to Pagan. Indeed, as the Village notes, the Ordinance impacts *only* public streets — not driveways or other private property. For these reasons,

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4. Pagan argues that the Ordinance is both unconstitutionally over and under inclusive. He contends that § 76.06 is over-inclusive because "the ordinance prohibits only for-sale signs on vehicles situate[sic] in the street; it excludes from prohibition for-sale signs on vehicles situate[sic] in driveways or private property." That argument overlooks the above authority, which notes the Supreme Court's observation that if a city has a sufficient basis for believing that for-sale signs are a traffic hazard and are unattractive, "then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them." *Metromedia*, 453 U.S. at 508.

Pagan further claims the Ordinance is under-inclusive because it "permits signage that is just as problematic as vehicle for-sale signs, and it denies a right to Pagan that it expressly permits to many others." However, the "reasonable fit" analysis required by *Central Hudson* does not require that the means chosen by the Village be the least restrictive means. *Reilly*, 533 U.S. at 556.

we hold that the Ordinance is a constitutional exercise of the Village's regulatory power.[5]

Burkow is a district court decision from another jurisdiction which, in our view, was wrongly decided. Moreover, the opinion is contrary to the weight of the above-cited authority. Indeed, a court should approach the idea of invalidating a local ordinance with caution, particularly if there is no suggestion that the government's promulgation of the ordinance was "palpably false." *See Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 109, 69 S. Ct. 463, 93 L. Ed. 533 (1949). As for the *Burkow* court's concern that the city presented no evidence, the district court in this case properly held that no evidence in the form of studies or other anecdotal evidence was necessary. Indeed, as the district court noted, the Ordinance "undoubtedly advances those interests [in promoting traffic safety and aesthetics] by trying to keep people out of busy streets." Such a conclusion is consistent with Supreme Court jurisprudence. *See Metromedia*, 453 U.S.

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5. Throughout these proceedings, Pagan has relied extensively on *Burkow v. City of Los Angeles*, 119 F. Supp. 2d 1076 (C.D. Cal. 2000), which granted a preliminary injunction preventing the city from enforcing against the plaintiff an ordinance containing language strikingly similar to § 76.06. Addressing the third *Central Hudson* factor, the district court concluded that the ordinance failed to directly advance the asserted governmental interests of traffic safety and aesthetics. *Id.* at 1080. In particular, the court noted that "the City has presented no studies or even anecdotal evidence, and 'not even [Plaintiff]'s own conduct suggests that [Defendant]'s concerns are justified.'" *Id.* (citing *Edenfield v. Fane*, 507 U.S. 761, 770-71, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993)). Addressing the fourth *Central Hudson* factor, the court concluded that insufficient alternative channels of speech remained available to plaintiff. *Id.* at 1082.

at 509 ("We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety.").

Affirmed.

DISSENT BY: ARTHUR J. TARNOW

DISSENT:

ARTHUR J. TARNOW, District Judge, dissenting. The majority concludes that the Village of Glendale's traffic ordinance is constitutional pursuant to case law addressing the impact of billboards on traffic safety and aesthetics. I might agree with the majority's decision, if the sign at issue were in fact a billboard. However, the sign at issue was not a billboard, but rather a small "For Sale" sign on the passenger and sidewalk side of a parked car. I believe that the Village failed to carry its burden of demonstrating that the ordinance is constitutional. Therefore, I dissent.

"It is well established that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Edenfield v. Fane*, 507 U.S. 761, 770, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993); *see also Thompson v. Western States Medical Center*, 535 U.S. 357, 373, 122 S. Ct. 1497, 152 L. Ed. 2d 563 (2002). The rationale for placing the burden of justifying commercial speech restrictions on the government is that "[i]f the First Amendment means anything, it means that regulating speech must be a last-not first-resort." *Thompson*, 507 U.S. at 770.

Appendix B

There is no dispute that Appellant's speech was entitled to constitutional protection because it concerned lawful activity and was not misleading. There is also no dispute that the Village has articulated "substantial" interests, namely, safety and aesthetics, in support of its regulation.

Under the third prong of the *Central Hudson* test, Glendale bears the burden of proving that the ordinance directly advances its asserted interests. *Edenfield, supra* at 770. "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 770-71; *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001).

The district court held that the ordinance was supported by common sense, and that Pagan "offer[ed] nothing more than his own speculation and subjective conclusions to argue that Glendale's legislative judgment is unreasonable, or even 'palpably false.'" Thus, the district court placed the burden of disproving the basis for the Glendale ordinance on Pagan, rather than placing the burden of justifying the speech restriction on the Village.

The district court erred in shifting the burden of proof to Pagan, rather than requiring the Village to come forward with some evidence to justify its restriction of commercial speech. *See Edenfield* and *Thompson, supra.*

Appendix B

As to the quantum of evidence needed to support a regulation of speech, this Court has held:

> A municipality is not required to conduct new studies or produce evidence independent of that already generated by other cities to demonstrate the problem of secondary effects, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

Bronco's Entertainment v. Charter Township of Van Buren, 421 F.3d 440, 451 (6th Cir. 2005) (internal quotations and citations omitted) (holding that memoranda prepared by a community planning and urban design firm, which cited studies showing that sexually oriented businesses are associated with increased crime and reduced property values, were sufficient to support the ordinance).

There is no evidence in the record supporting the Village's assertion that § 76.06 promotes public safety by keeping pedestrians out of the street or preventing distractions to motorists. *See Bronco's Entertainment, supra* at 451 (City is not required to produce *new and independent evidence*, so long as "whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.") (emphasis added). § 76.06 is not supported by any findings or evidence, new or old, demonstrating that any pedestrians or motorists were injured, or could be injured, while inspecting vehicles displayed for sale on the streets of Glendale.

Appendix B

Unlike the memoranda at issue in *Bronco's Entertainment*, *supra*, there is no evidence which could reasonably be believed to be relevant to the problem that the city addresses. The only evidence presented is in the form of speculation and conjecture. Under *Edenfield* and *Thompson*, such evidence is insufficient to satisfy the Village's burden.

Given the lack of evidence supporting § 76.06, Glendale argues that the Ordinance should be upheld so long as it is not "manifestly unreasonable." According to Glendale, "the District Court properly analyzed this issue under the case law governing traffic ordinances and zoning resolutions relating to billboards and signs and their effect on traffic control and safety." Glendale takes the position that when the harms recited by the municipality are a matter of common sense, Courts are not required to demand more extensive proof that the harms are real or empirically proven.

Generally, the Supreme Court has "recognized that state interests in traffic safety and esthetics may justify zoning regulations for advertising." *Lorillard*, 533 U.S. at 551 (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)).

In *Metromedia*, *supra*, the Supreme Court affirmed San Diego's billboard restrictions despite a meager factual record showing a connection between billboards and traffic safety. The Court "hesitate[d] to disagree with the accumulated, commonsense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety." *Metromedia*, *453* U.S. at 508-09.

Appendix B

I agree that the accumulated judgments of local governments concerning billboard regulations are entitled to judicial deference. However, deference has its limits, since "the First Amendment . . . does not permit municipalities to regulate methods of expression however, whenever, and wherever they wish." *Prime* Media, 398 F.3d at 818.

In this case, there is no accumulation of evidence or judgments concerning the dangers posed by "For Sale" signs on parked cars. There is no evidence in the record concerning the effectiveness of § 76.06 at alleviating the asserted dangers. Therefore, § 76.06 warrants closer scrutiny. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 624, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995) (citing *Edenfield*, 507 U.S. at 761) ("Unlike rational basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions.")

The majority cites the Supreme Court's decision in *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994), where the Court held that:

> [Signs can] pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternate uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs—just as they can, within

> reasonable bounds and without censorial purpose, regulate audible expression in its capacity as noise.

Id. at *13 (citing *Gilleo*, 512 U.S. at 48).

I agree that the power of regulating the physical characteristics of signs, and especially billboards, properly rests with local governments. However, that power does not extend so far as to authorize the application of § 76.06 in the manner urged in this case. The Ordinance does not regulate the physical characteristics of "For Sale" signs, but rather bans a subset of such signs outright.

There is no common sense connection between Glendale's restriction of commercial speech and pedestrian safety. Glendale's common sense argument is not made in light of a "long history" or "substantial consensus" showing that "For Sale" signs imperil public safety. Glendale's argument rests only on the speculation and conjecture of its police chief.

Common sense dictates that if the City of Glendale were aware of even a single incident in which a pedestrian were injured while inspecting a vehicle which displayed a "For Sale" sign in the corner of the windshield, such incident would be cited in the pleadings. Without any evidence to suggest that there is an actual danger presented by the display of "For Sale" signs, there is not a sufficient justification for the Village's speech restriction.

Appendix B

Glendale's un-supported assertion that its ordinance is justified by common sense is insufficient to justify its regulation of commercial speech. This is especially true since the ordinance, as applied to Pagan, leaves the seller with no alternative channel for communicating their commercial message. Therefore, I would reject Glendale's argument that the burden on local governments to produce evidence in support of commercial speech restrictions should be relieved where the government simply asserts that there is a "common sense" justification for the restriction.

Under the Fourth Prong of the *Central Hudson* test, Glendale bears the burden of showing that § 76.06 is not "substantially broader than necessary to protect [its] interest." *Prime Media, Inc. v. City of Brentwood*, 398 F.3d at 822 (6th Cir. 2005) (quoting *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984)). In other words, the Village "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799-800, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (citing *Frisby v. Schultz*, 487 U.S. 474, 485, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1983)).

The Village is not required to eliminate all less-speech-restrictive alternatives. *Prime Media*, 398 F.3d at 819-20. However, "if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *City of Cincinnati v. Discovery Network, Inc.*,

Appendix B

507 U.S. 410, 418 n. 13, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993).

Glendale's traffic ordinance is targeted at the problems of traffic safety, pedestrian safety, and aesthetics. However, § 76.06 is not a "reasonable fit" for the asserted safety concerns.

First, the plain language of the Ordinance reveals that there are numerous and obvious less-burdensome alternatives to the ban on "For Sale" signs. Subsection (B) of the Ordinance prohibits washing or repairing vehicles in the roadway, without any impact on commercial speech. Just as the ordinance prohibits washing or repairing a vehicle in the roadway, so could it prohibit pedestrians from entering the roadway for the purpose of inspecting a vehicle. It is obvious that the Village could directly address the asserted problems without any impact on commercial speech. Instead, the Village has imposed a complete ban on commercial speech, without any evidence of a connection between the speech and the asserted dangers. Therefore, § 76.06 is substantially broader than necessary to protect the Village's interests.

As to the distraction of passing motorists, there is no meaningful distinction between regulated and un-regulated vehicles. Passing motorists are just as likely to have their attention diverted by "For Sale" signs attached to cars parked in driveways, or by the display of business names or addresses, which Glendale concedes would be permitted under the Ordinance. Therefore, the Village has failed to sustain its burden of showing that these dangers distinguish regulated vehicles from non-regulated vehicles.

In addition, only "For Sale" signs on parked vehicles are prohibited, while "For Sale" signs on moving cars are allowed. There is no reasonable reason to believe that a sign posted in a parked car is any more dangerous than a sign posted in a moving car. This is especially true as applied to Pagan, since his "For Sale" sign was on the curb side of a parked car.

Also, Glendale has not shown a reasonable connection between the ordinance and the preservation of aesthetic values. "For Sale" signs and cars exhibited for the purpose of advertising may be an eyesore whether they are standing on private property, parked on the street, or being driven on the road. They are no more aesthetically harmful than the business advertisements permitted under the Ordinance. In fact, car owners in Glendale could adorn their parked vehicles with whatever signs they wished, no matter how distracting, so long as the signs did not indicate that the parked vehicle was "For Sale."

As applied to Pagan, the sign posted in his car did not pose any threat to aesthetics, pedestrian safety, or traffic safety. Pagan's "For Sale" sign was posted in the lower right hand corner of the car's front windshield, that is, on the curb side of the vehicle. § 76.06 is unreasonably broad to the extent that it seeks to preserve traffic safety by allowing "For Sale" signs on moving cars as well as virtually any other signs on parked cars, while criminalizing "For Sale" signs that are posted only on the curb side of a parked vehicle.

Finally, § 76.06 is substantially broader than necessary because it imposes a wholesale ban on an inexpensive and

autonomous method of communication and leaves individual sellers without viable alternatives for communicating their commercial messages. In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 97 S. Ct. 1614, 52 L. Ed. 2d 155 (1977), the Supreme Court struck down a municipal ban on "For Sale" and "Sold" signs in front yards. The Court observed:

> Although in theory sellers remain free to employ a number of different alternatives, in practice reality is not marketed through leaflets, sound trucks, or the like. The options to which sellers realistically are relegated-primary newspaper advertising and listing with real estate agents-involve more costs and less autonomy than "For Sale" signs; are less likely to reach persons not deliberately seeking sales information; and may be less effective media for communicating the message that is conveyed by a "For Sale" sign in the front of the house to be sold. The alternatives, then, are far from satisfactory.

Linmark, 431 U.S. at 93.

In *Cleveland Area Board of Realtors v. City of Euclid*, 88 F.3d 382 (6th Cir. 1996), this Court invalidated a city ordinance that banned the display of all yard signs, with an exception for signs displaying the residents' name and

address and pertinent security system information. We concluded that

> by banning yard signs altogether, with an exception only for a minimal amount of information necessary for safety and security reasons, the government burdened substantially more speech than necessary, because it completely foreclosed an inexpensive and autonomous way to communicate.

Id. at 388.

In this case, Glendale has not satisfied its burden to demonstrate narrow-tailoring because § 76.06 completely barred Pagan from communicating his commercial message. The prohibition on standing or parking vehicles in the street for the purpose of displaying them for sale applies to all vehicles, on all streets, and at all times, without any showing that such vehicles are dangerous. As applied to Pagan, who does not own a driveway fronting a public street, § 76.06 functioned as a complete ban on commercial expression. Thus, the Ordinance is not narrowly tailored.

The majority correctly notes that the test for commercial speech regulations is substantially similar to the test for time, place, and manner restrictions. However, it should be noted that the Ordinance fails one critical aspect of the time, place, and manner test because it is not content neutral.

Section 76.06 is not content neutral because whether any particular vehicle on the streets of Glendale falls within the

ban is determined by the content of the sign on the vehicle and/or the purpose for which it is placed in the street.

The ordinance prohibited Pagan from placing a small "for sale by owner" sign in the window of his car. However, the ordinance would not have prohibited Pagan from standing or parking his car in the street for the purpose of displaying a large, distracting sign which endorsed a candidate for public office. In other words, the ordinance does not apply equally across categories, such as "music, political speech, and advertising." *Discovery Network*, supra at 428 (citation omitted). On its face, § 76.06 targets only commercial speech, and therefore does not satisfy the requirement that commercial and non-commercial speech be treated alike.

In addition, the district court's memorandum and order clarified that the ordinance is not content neutral as to the type of advertising targeted for regulation. Under the construction of the ordinance accepted by the district court, § 76.06 allows all businesses to display their names or addresses on the sides of vehicles owned and used by those businesses. The distinction between advertisements for businesses and "For Sale" signs by individual sellers proves that § 76.06 is a content-based speech regulation.

§ 76.06 is not content neutral because it targets only commercial speech, and discriminates against a specific form of commercial speech; namely, "For Sale" signs. Therefore, § 76.06 is not a valid time, place, and manner regulation.

For the foregoing reasons, I respectfully dissent.

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION DATED SEPTEMBER 30, 2004

UNITED STATES DISTRICT COURT FOR THE S.D. OHIO, WESTERN DIVISION

No. 1:03-cv-541

Christopher J. **PAGAN,**

Plaintiff

v.

Police Chief **FRUCHEY** and
The Village of **Glendale,** Ohio,

Defendants.

Sept. 30, 2004.

MEMORANDUM AND ORDER

SANDRA S. BECKWITH, Chief United States District Judge.

Before the Court are the Defendants' motion for summary judgment (Doc. 8) and Plaintiff's cross-motion for summary judgment (Doc. 11).

Appendix C

Factual Background

The following facts are not in dispute. Plaintiff Christopher Pagan is a resident of the Village of Glendale, Ohio. He owned an automobile that he wanted to sell. He parked the car in front of his house on Sharon Road, a public street, and put a " For Sale" sign in the car window. A Glendale police officer saw the sign, told Pagan that the sign was illegal under a Village ordinance, and asked him to remove the sign.

The ordinance at issue, Section 76.06 of the Glendale Traffic Code, states:

It shall be unlawful for any person to stand or park any vehicle, motorized or towed, upon any public or private street, road, or highway within the village or upon any unimproved privately owned area within the village for the purpose of:

> (A) Displaying it for sale, except that a homeowner may display a motor vehicle, motorized or towed, for sale only when owned and titled to said homeowner and/or a member of said household, and only when parked upon an improved driveway or apron upon the owner's private property.
>
> (B) Washing, maintaining or repairing such vehicle except repairs necessitated by an emergency.
>
> (C) Any advertising.

Appendix C

Pagan sent an email to Walter Cordes, apparently a **Glendale** official, asking for a copy of the ordinance. **Pagan's** email also states that he is a lawyer who litigates cases, and that he knows that " cities have been found liable in enforcing sign ordinances that prohibit commercial speech." **Pagan** stated he didn't want to be a problem, but he didn't want to forfeit his First Amendment rights either. (Doc. 8, **Fruchey** Affidavit Exhibit B) Mr. Cordes forwarded the email to **Glendale** Police Chief Matt **Fruchey,** who drove by Plaintiff's house, saw the car, and gave a copy of the ordinance to Plaintiff's wife. Chief **Fruchey** invited Plaintiff to call if he had further questions or concerns, but asked him to remove the sign. (**Fruchey** Affidavit Exhibit C)

Plaintiff instead responded that he had found a case supporting his right to "engage in commercial speech." He proposed that the police allow him to leave the car with the sign up for another three weeks, by which time he expected the car to be sold. If that deal was not "palatable," Plaintiff said he intended to file an action in federal court seeking to have the law declared unconstitutional. (Doc. 8, **Fruchey** Affidavit Exhibit D) Chief **Fruchey** referred Plaintiff's concerns about the legality of the ordinance to the village solicitor, but told Plaintiff to remove the sign or he would be cited. (**Fruchey** Affidavit, Exhibit E) At approximately 6:30 p.m. that same day, a **Glendale** officer drove past the car and saw that the sign had been removed. Plaintiff was never cited by the Village for any violation of the ordinance. Instead, a week after the sign was removed, Plaintiff filed this lawsuit against the Village of Glendale and Chief Fruchey, asserting a panoply of constitutional claims and seeking an injunction against enforcement of the ordinance.

Appendix C

The parties filed motions for summary judgment. Plaintiff's motion (Doc. 11) withdraws his request for injunctive relief, and narrows his constitutional claims to one: the **Glendale** Traffic Ordinance violates Plaintiff's First Amendment rights. He also argues that Chief **Fruchey** is not entitled to immunity from his § 1983 claim, because Chief **Fruchey** violated Plaintiff's clearly established constitutional right to be free of the ordinance's restrictions.

ANALYSIS

1. *Summary Judgment Standards.*

The standards for summary judgment are well established. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The party opposing a properly supported summary judgment motion " 'may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.' " *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (quoting *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253 (1968)). The Court is not duty bound to search the entire record in an effort to establish a lack of material facts. *Guarino v. Brookfield Township Trs.*, 980 F.2d 399, 404 (6th Cir.1992); *InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir.1989), *cert. den.*, *Superior Roll Forming Co. v. InterRoyal Corp.*, 494 U.S. 1091 (1990). Rather, the burden is on the non-moving party to " present affirmative evidence

to defeat a properly supported motion for summary judgment . . .," *Street v.. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir.1989), and to designate specific facts in dispute. *Anderson*, 477 U.S. at 250. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industries Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The court construes the evidence presented in the light most favorable to the non-movant and draws all justifiable inferences in the non-movant's favor. *United States v. Diebold Inc.*, 369 U.S. 654, 655 (1962).

The court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. The court must assess " whether there is the need for trial-whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250. "If the evidence is merely colorable, . . . , or is not significantly probative, . . . , the court may grant judgment." *Anderson*, 477 U.S. at 249-50 (citations omitted). The Supreme Court has held:

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a

> preponderance of the evidence that the plaintiff is entitled to a verdict. . .

Id. at 252. Hence the " 'mere possibility' " of a factual dispute will not suffice. *Mitchell v. Toledo Hospital*, 964 F.2d 577, 582 (6th Cir.1992), quoting *Gregg v. Allen-Bradley Co.*, 801 F.2d 859, 863 (6th Cir.1986).

Summary judgment is not appropriate simply because the weight of the evidence favors the moving party. *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 472 (1962). The issue of material fact required "to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Cities Serv. Co., supra*, 391 U.S. at 288-89.

Although summary judgment must be used with extreme caution since it operates to deny a litigant his day in court, *Smith v. Hudson*, 600 F.2d 60, 63 (6th Cir. 1979), *cert. dismissed*, 444 U.S. 986 (1979), the United States Supreme Court has stated that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (citations omitted).

Appendix C

2. Plaintiff's Standing.

Defendants argue that Plaintiff lacks standing to challenge the ordinance, because he was never cited and voluntarily complied by removing the For Sale sign from his car. Plaintiff argues that under *Mangual v. Rotger-Sabat*, 317 F.3d 45 (1st Cir.2003), a "credible threat of prosecution" is enough to confer standing to challenge the ordinance. Plaintiff contends that he faced 30 days in jail if he was cited under the ordinance. Defendants persuasively argue that Plaintiff misreads the applicable ordinances and the Ohio statute addressing "minor misdemeanors." If Plaintiff had been cited (which he was not), he would have been subjected to a fine of not more than $100. See Glendale Ordinance Sec. 70.99(A)(3).

An "injury in fact" necessary to confer standing requires the plaintiff to "show that he *personally* has suffered some actual **or** threatened injury." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) (emphasis added). While the potential monetary loss here appears to be relatively minor, a threatened fine of not more than $100 plus a possible invasion of First Amendment rights are clearly a cognizable "injury." The Court finds that Plaintiff has standing to challenge the Glendale ordinance.

Plaintiff also suggests that because he was forced to remove the sign, he had to sell the car for $500 less than its appraised value. Even if this economic impact is relevant, which is far from clear-see, *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 412 (6th Cir.1997) [aggregate economic effects,

not any individual impact, is relevant to First Amendment inquiry]-the Court rejects Plaintiff's suggestion that this $500 "loss" is an injury-in-fact. Plaintiff's bare assertion, supported only by his speculation, is not sufficient to raise a triable issue of fact on this question.

3. Constitutionality of the Glendale Traffic Ordinance.

The parties agree that Plaintiff's "For Sale" sign is commercial speech. Plaintiff argues that the ordinance is unconstitutional under the standards set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), while Defendants assert that the ordinance passes constitutional muster.

Central Hudson set out a four-part analysis for commercial speech cases. "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566. The first two steps of this analysis are not in dispute: Plaintiff's sign is a lawful activity and is not misleading.

Defendants contend that the Village of Glendale's interest in promulgating the ordinance is to promote traffic safety,

and to prevent people from being in public roads and streets unless they are part of traffic flow (either vehicular or pedestrian). A secondary goal of the ordinance is to promote aesthetic objectives of the Village. (Affidavit of Fruchey, ¶ 3). Plaintiff concedes that traffic safety is a substantial governmental interest, but challenges the Village's evidence on whether the ordinance "directly advances" this governmental interest, and whether it is more extensive than necessary.

Plaintiff claims that the affidavit of Chief Fruchey is not sufficient to carry Defendants' burden on this question. While the Defendants have not presented the kind of evidence that Plaintiff obviously prefers, such as an ordinance "whereas" clause, a preamble, or a "legislative record," the Court finds that such evidence is not necessary here. It seems self-evident that Traffic Ordinances in general, and the Glendale Ordinance in particular, are directly related to traffic control and safety. This Ordinance undoubtedly advances those interests by trying to keep people out of busy streets.

But, Plaintiff argues, the Village's "true interest" in passing the ordinance was to suppress vehicle sales. This is a puzzling argument, since the Ordinance expressly permits residents to advertise their cars for sale while parked on driveways, or an apron on their property. And since there are myriad ways to sell a vehicle, other than leaving it parked in a public street with a For Sale sign in the window, Plaintiff's argument is nonsensical.

Then Plaintiff contends that the Village has permitted other vehicles to be parked on public roads with For Sale

signs, and has permitted commercial vans (which carry advertising on their sides of the business) to be parked on public roads. Thus Plaintiff suggests that the Village has unfairly subjected Plaintiff to the strictures of the Ordinance. The photographs Plaintiff offers do not substantiate his claim. The two photographs of vehicles parked with For Sale signs (Doc. 12, Plaintiff's Affidavit, Exhibit 4) clearly show that neither one is parked in a street. Both cars are off-street, on what appears to be, and what Defendants state is in fact private property. Plaintiff has not challenged Defendants' statement.

Another photo (Doc. 12, Plaintiff's Affidavit, Exhibit 5) shows a commercial van parked on a street, carrying the sign "Iron Horse Inn." Plaintiff argues this violates § 76.06(C), prohibiting the parking of a vehicle for the purpose of "any advertising." While Plaintiff was not charged with violating this subsection of the Ordinance, he contends that the Village tolerates violation of the ordinance, thus undermining the Village's asserted governmental interest in traffic safety.

Plaintiff's interpretation of subsection (C) of the Ordinance is unreasonable. It is intended to prohibit vehicles which are parked on the street for the singular purpose of advertising, not to prohibit all businesses from displaying their names or addresses on the sides of vehicles owned and used by those businesses. Defendant explains that subsection (C) of the ordinance is enforced against advertising that is not "an integral part of the vehicle, such as banners or other signage which could interfere with safety considerations." (Affidavit of Fruchey, ¶ 3). This seems plain from the text of

the ordinance, and Plaintiff has offered no evidence which raises even an inference that the Ordinance is applied in some unacceptable or unconstitutional fashion.

Plaintiff also suggests that vehicle for-sale signs do not pose an "actual problem" for traffic safety, and that the Village has not adduced extrinsic evidence (traffic safety studies, for example) to support their conclusion. Plaintiff points out that other types of signs, like home for sale signs, political signs, garage sale signs, all may pose traffic safety issues. Yet the Village has chosen only to regulate the vehicle for-sale signs. The fact that Plaintiff may believe that the ordinance does not go far enough or fails to regulate other types of "dangers" to traffic control or safety is irrelevant to the constitutional analysis of the ordinance. See, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509 (1981): "If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. The city has gone no further than necessary in seeking to meet its ends. Indeed, it has stopped short of fully accomplishing its ends: It has not prohibited all billboards, but allows onsite advertising and some other specifically exempted signs." The same observations hold true about Glendale's Traffic Ordinance.

Moreover, it is not this Court's task nor function to second-guess the decisions of the Village of Glendale concerning appropriate traffic safety ordinances. As the Supreme Court long ago observed, "We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no

relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 109 (1949). Plaintiff offers nothing more than his own speculation and subjective conclusions to argue that **Glendale's** legislative judgment is unreasonable, or even "palpably false." That is not enough.

The Court finds that the **Glendale** Traffic Ordinance, § 76.06, is not an unconstitutional invasion of Plaintiff's First Amendment rights.

4. *Qualified Immunity of Chief **Fruchey**.*

Finally, Chief **Fruchey** seeks summary judgment based on qualified immunity. Plaintiff agrees that Chief **Fruchey** is entitled to qualified immunity **unless** Plaintiff can establish a violation of a clearly established constitutional right that a reasonable public official would understand was being violated. Plaintiff relies almost entirely upon one California case, *Burkow v. City of Los Angeles*, 119 F.Supp.2d 1076 (2000), to support his argument that Chief Fruchey "knew or should have known" he was violating Plaintiff's First Amendment rights when he asked that the For Sale sign be removed. This argument borders on frivolity.

Burkow was a decision of a district court in another state; the court granted a preliminary injunction against a Los Angeles ordinance with some similarity to the Glendale ordinance at issue. There was no final decision on the merits. More importantly, however, a single preliminary injunction

opinion does not create a "clearly established constitutional right" such that Chief Fruchey should forfeit his immunity. The Sixth Circuit has held in this regard: "A right is not considered clearly establishe . unless it has been authoritatively decided by the United States Supreme Court, the Court of Appeals, or the highest court of the state in which the alleged constitutional violation occurred." *Durhm v. Nu'Man*, 97 F.3d 862, 866 (6th Cir.1996). In the absence of any clear authority of the Supreme Court or the Sixth Circuit that vehicle for sale sign prohibitions like the Glendale Ordinance violate the First Amendment, Chief Fruchey is entitled to qualified immunity.

CONCLUSION

For all of the foregoing reasons, the Court grants Defendants motion for summary judgment and denies Plaintiff's motion for summary judgment.

71

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No. 07-420

FILED

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

THE VILLAGE OF GLENDALE, OHIO,

Petitioner,

v.

CHRISTOPHER J. PAGAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

The en banc U.S. Court of Appeals for the Sixth Circuit struck down a municipal ordinance criminalizing certain car window "For Sale" signs because the Village of Glendale, Ohio, despite having an affirmative burden under *Edenfield v. Fane*, 507 U.S. 761 (1993), offered no evidence that its censorship of truthful commercial speech addressed any actual, as opposed to merely hypothetical, danger to the public.

The question thus presented is:

Whether, in the context of traffic safety and aesthetics, a previously unrecognized exception to *Edenfield* absolves the government of its burden to justify the censorship of truthful commercial speech with real evidence that the censored speech will cause real harm to the community?

RULE 29.6 DISCLOSURE STATEMENT

Respondent Christopher J. Pagan is not a corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
STATEMENT	1
A. The Facts	1
B. The Decision of the District Court	3
C. The Panel Decision of the Sixth Circuit	5
D. The En Banc Decision of the Sixth Circuit	6
THE PETITION SHOULD BE DENIED	8
I. THE COURT DOES NOT NEED TO REVIEW THIS CASE BECAUSE THE SIXTH CIRCUIT IS NOT IN DISAGREEMENT WITH ANY JURISDICTION IN THE UNITED STATES	8
A. There Is Universal Judicial Agreement On The Unconstitutionality Of Prohibiting Car Window "For Sale" Signs	8
B. The Sixth Circuit's Decision That Glendale Needed Real Evidence Of Real Harm To Prohibit Pagan's "For Sale" Sign In The Name Of Traffic Safety And Aesthetics Does Not Conflict With The Decisions Of This Court Or Any Other Court	9

TABLE OF CONTENTS – Continued

Page

C. There Is Also No Conflict Between The Sixth Circuit And This Court Or The Circuit Courts Of Appeal Because *Metromedia* And The Other Billboard Authority Glendale Cites Are Distinguishable On Their Facts 12

D. There Is No Conflict Between The Sixth Circuit And Any Other Court On The Use Of Common Sense Because Glendale's Definition Of Common Sense, Not That Of The Sixth Circuit, Is Unsupported In The Case Law 17

II. THERE IS NO QUESTION OF EXTRAORDINARY PUBLIC SIGNIFICANCE AT ISSUE IN THIS CASE BECAUSE GLENDALE CAN ADDRESS ITS INTEREST IN TRAFFIC SAFETY AND AESTHETICS BY REGULATING PARKING INSTEAD OF SPEECH 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 12, 15

Ackerly Communications of the Northwest, Inc. v. Krochalis, 108 F.3d 1095 (9th Cir. 1997) 12

Advantage Media, L.L.C. v. City of Eden Prairie, 456 F.3d 793 (8th Cir. 2006) 12

Amelkin v. McClure, 168 F.3d 893 (6th Cir. 1999), *rev'd in part on other grounds*, 205 F.3d 293 (6th Cir. 2000) 7

Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 622 (2d Cir. 2002) 17

Bad Frog Brewery v. N.Y. State Liquor Auth., 134 F.3d 87 (2d Cir. 1998) 7

Bailey v. Morales, 190 F.3d 320 (5th Cir. 1999) 7

Ballen v. City of Redmond, 466 F.3d 736 (9th Cir. 2006) 13

Bd. of Tr. of the State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989) 10

Bigelow v. Virginia, 421 U.S. 809 (1975) 5

Burkow v. City of Los Angeles, 119 F. Supp.2d 1076 (C.D. Cal. 2000) 9

Burson v. Freeman, 504 U.S. 191 (1992) 17, 18, 19

Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993) 16, 17

Ctr. for Bio-Ethical Reform, Inc. v. Cunningham, 455 F.3d 910 (9th Cir. 2006) 12

Edenfield v. Fane, 507 U.S. 761 (1993) ..... *passim*

El Dia, Inc. v. P.R. Dep't of Consumer Affairs, 413 F.3d 110 (1st Cir. 2005) 7

Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173 (1999) 7

Kovacs v. Cooper, 336 U.S. 77 (1949) 13

Lavey v. The Lakeland Group, Inc., 171 F.3d 110 (7th Cir. 1999) 12

Lindsay v. City of San Antonio, 821 F.2d 1103 (5th Cir. 1987) 17

Long Island Bd. of Realtors, Inc. v. Incorporated Village of Massapequa Park, 227 F.3d 622 (2d Cir. 2002) 16

Lorillard Tobacco Co. v. Reilley, 533 U.S. 525 (2001) 7, 17

Mason v. Fla. Bar, 208 F.3d 952 (11th Cir. 2000) 8

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) ..... *passim*

Milwaukee v. Blondis, 460 N.W.2d 815 (Wis. Ct. App. 1990) 9

Missouri ex rel. Nixon v. Am. Blast Fax, Inc., 323 F.3d 649 (8th Cir. 2003) 8

TABLE OF AUTHORITIES – Continued

Page

Nat'l Adver. Co. v. The City and County of Denver, 912 F.2d 405 (10th Cir. 1990) 12

Pac. Frontier v. Pleasant Grove, 414 F.3d 1221 (10th Cir. 2005) 8

Pagan v. Fruchey, 2004 WL 5338455 (S.D. Ohio Sept. 30, 2004) 4

Pagan v. Fruchey, 453 F.3d 785 (6th Cir. 2006) 5

Pagan v. Fruchey, 492 F.3d 766 (6th Cir. 2007) (en banc) ..... *passim*

Pearson v. Edgar, 153 F.3d 397 (7th Cir. 1998) 8, 17, 18

Pearson v. Shalala, 164 F.3d 650 (D.C. Cir. 1999) 8

People v. Moon, 152 Cal. Rptr. 704 (Cal. App. Dep't Super. Ct. 1978) 9

Pitt News v. Pappert, 379 F.3d 96 (3rd Cir. 2004) 7, 17

Psinet, Inc. v. Chapman, 362 F.3d 227 (4th Cir. 2004) 7

Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) 5, 10

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) 7

South Suburban Housing Ctr. v. Greater South Suburban Bd. of Realtors, 935 F.2d 868 (7th Cir. 1991) 17

TABLE OF AUTHORITIES – Continued

Page

United States v. Edge Broadcasting Co., 509 U.S. 418 (1993) 18, 19, 20

Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748 (1976) 15

W. States Med. Ctr. v. Shalala, 238 F.3d 1090 (9th Cir. 2001), *aff'd*, 535 U.S. 357 (2002) 8

CONSTITUTIONAL PROVISION

U.S. Const. amend. I ..... *passim*

CODES

Glendale Traffic Code
Sec. 70.99 2
Sec. 76.06 ..... *passim*

STATEMENT

This case does not merit review because it involves neither an irreconcilable conflict with this Court or the Circuit Courts of Appeal nor a First Amendment question of exceptional national importance. The Sixth Circuit, sitting en banc, is the only federal appellate court to have addressed the constitutionality of outlawing car "For Sale" signs. Not only is there no federal appellate conflict, every other court in the country to have considered this specific fact-pattern also ruled in favor of the speaker.

In addition to this unanimous judicial consensus, there is also no pressing need for the Court to intervene because municipalities can easily advance their interest in traffic safety and aesthetics by prohibiting parking for the purpose of selling a car rather than, as Glendale unwisely did, ignore the act of parking and focus instead on harmless speech.

The Respondent therefore respectfully urges this Court to deny the petition.

A. The Facts

The facts are simple. In 2003, Christopher Pagan (Pagan), an attorney who lives in the Village of Glendale, Ohio (Glendale or Village), took out a classified ad to sell a 1970 Mercury Cougar he accepted from a client in lieu of fees. The ad drew only a few inquiries so Pagan did what people have done since the advent of the automobile – he put a small 8.5 x 11 inch "For

Sale" sign in the window of his car while it was legally parked on the street in front of his home. This turned out to be a great idea because his phone rang off the hook.

This also turned out to be a terrible idea because it made him a criminal. In July 2003, Glendale Police Chief Matt Fruchey (Chief Fruchey) told Pagan that the "For Sale" sign was illegal under section 76.06 of the Glendale Traffic Code, which outlaws, *inter alia*, displaying a vehicle for sale. Because Pagan received a parking ticket the prior year, he faced a $250 fine and 30 days in jail.[1] Chief Fruchey instructed Pagan to remove the sign, which he did and was never cited.[2]

Contrary to the Village's gloss, Pet. at i, Chief Fruchey's enforcement of section 76.06 imposed a *direct*, not incidental, burden on Pagan's speech. Chief Fruchey enforced section 76.06 solely against the content of Pagan's sign. Glendale has never disputed that his sign would have been legal had it borne different words such as "Vote Obama" or "Go Buckeyes." Nor has Glendale ever disputed that Pagan fully obeyed the law just by taking his sign down. The Village has always maintained that the specific words on Pagan's sign, and not the sign itself or the presence of his car in the street, constituted the

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[1] Under section 70.99 of the Glendale Traffic Code, putting up a "For Sale" sign is a fourth class misdemeanor if the offender, like Pagan, received a parking ticket in the prior year.

[2] A claim for damages remains.

violation of section 76.06. *Pagan v. Fruchey*, 492 F.3d 766, 772 (6th Cir. 2007) (en banc). This case has thus always been about Glendale's direct and intentional regulation of the specific words on Pagan's sign, not about the regulation of something else that just happened to have an incidental effect on his speech.

B. The Decision of the District Court

Pagan filed suit in the Southern District of Ohio under the free speech clause of the First Amendment. The parties filed cross-motions for summary judgment, agreeing that the applicable standard is the intermediate scrutiny of the four-part test for restrictions on commercial speech from *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). To regulate commercial speech under *Central Hudson*, the government must establish: (1) the speech is truthful and not misleading; (2) the government has a substantial regulatory interest; (3) the law materially advances that interest; (4) and the law is no more extensive than necessary to satisfy the regulatory interest.

There was no dispute about the truthfulness of Pagan's "For Sale" sign nor that Glendale has a substantial interest in traffic safety and aesthetics. The case turned on whether Glendale established under the third-prong of *Central Hudson* that its prohibition on car "For Sale" signs materially advanced its regulatory interest by mitigating a real danger to the public. Under *Edenfield v. Fane*, 507

U.S. 761, 770-771 (1993), the third-prong of *Central Hudson* requires the government to prove with real evidence that the regulated speech poses a real danger to the public. Mere speculation never suffices.

Pagan argued that Glendale failed to satisfy its affirmative burden because all the Village submitted in support of its summary judgment motion was a meaningless affidavit from Chief Fruchey. In it, Chief Fruchey merely averred that the "primary purpose" of section 76.06 is to promote traffic safety by prohibiting "attractions or activities which will induce people to come into the roadway who are not part of normal vehicular or pedestrian traffic, such as . . . individuals who are looking over a motor vehicle which is displaying a for sale sign parked in the street." Chief Fruchey further noted, without elaboration, that "the Ordinance also addresses aesthetic objectives of the Village of Glendale." Pagan urged the District Court to grant his motion for summary judgment because, under *Edenfield*, Glendale's affirmative burden is never satisfied by a conjectural affidavit like that of Chief Fruchey that, to the extent it conveys anything, simply speculates about the possibility that without censorship something might happen one day that might be bad. 507 U.S. at 770-771.

The District Court nevertheless granted final summary judgment to Glendale. *Pagan v. Fruchey*, 2004 WL 5338455 (S.D. Ohio Sept. 30, 2004). Though purportedly applying the intermediate scrutiny of *Central Hudson*, the District Court concluded that it must defer to the legislative judgment of Glendale

absent compelling evidence from Pagan that this judgment is "palpably false." In elucidating this novel "palpably false" standard of First Amendment review, the District Court relied largely on *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), a rational basis equal protection case – mentioned in passing in the fractured plurality decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509 (1981) – that predated by 25 years this Court's extension of the First Amendment to commercial speech in *Bigelow v. Virginia*, 421 U.S. 809 (1975). Other than *Metromedia*, the District Court did not cite any of this Court's many commercial speech decisions, conspicuously overlooking *Edenfield* and its voluminous progeny.

C. The Panel Decision of the Sixth Circuit

A divided panel of the Sixth Circuit affirmed. *Pagan v. Fruchey*, 453 F.3d 785 (6th Cir. 2006). Like the District Court, the two-judge majority held that a municipality such as Glendale is entitled to broad, and indeed all but limitless, deference when regulating commercial speech in the name of traffic safety and aesthetics. Also like the District Court, the panel majority failed to cite, much less distinguish, *Edenfield* or any of this Court's germane commercial speech authority.

D. The En Banc Decision of the Sixth Circuit

The Sixth Circuit, sitting en banc, then reversed the District Court. Citing this Court's extensive commercial speech precedent, the en banc majority correctly stated that, in defending a restriction on commercial speech under the third-prong of *Central Hudson*, "the government must come forward with some quantum of evidence, beyond its own belief in the necessity for regulation, that the harms it seeks to remedy are concrete and that its regulatory regime advances the stated goals." *Pagan*, 492 F.3d at 771. The en banc majority concluded that Glendale failed to do this because the vacuous affidavit of Chief Fruchey, which merely purported to describe the purpose of Glendale's ordinance, was not evidence of anything. *Id.* at 773.

The Sixth Circuit also recognized that Glendale was never really trying to vindicate Chief Fruchey's affidavit at all. On the contrary, the "thrust of [Glendale's] argument is not that the Fruchey affidavit is the type of evidence required by *Edenfield* but rather that other Supreme Court authority relieves [the Village] from meeting the *Edenfield* requirements as to how a governmental entity must meet its burden under *Central Hudson*." *Id.* at 774. Glendale, in other words, argued below – and argues again before this Court – that the government in effect has no burden at all when regulating the content of speech in the name of traffic safety and aesthetics. Glendale contends instead that its censorship is susceptible to review only under the novel "palpably false" standard,

a position tantamount to saying that the First Amendment vanishes when government waves the talisman of traffic safety and aesthetics.

The en banc majority properly struck down section 76.06 because there is no "traffic safety and aesthetics" exception to the First Amendment. Quite the opposite, an unbroken line of this Court's precedent – from *Central Hudson* through *Metromedia* and *Edenfield* to the present – categorically requires the government to defend its restrictions on commercial speech with real proof that the restrictions materially advance the government's regulatory interest by preventing a real harm to the community.[3]

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[3] This Court and every Circuit Court of Appeals routinely applies the *Edenfield* doctrine in a variety of contexts. The diversity of circumstances in which the appellate judiciary has applied *Edenfield* belies Glendale's claim, Pet. at 10, that *Edenfield* is narrow. *See, e.g., Lorillard Tobacco Co. v. Reilley*, 533 U.S. 525, 555 (2001) (striking down state regulation of tobacco advertising); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (addressing FCC restrictions on gambling advertising); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995); *El Dia, Inc. v. P.R. Dep't of Consumer Affairs*, 413 F.3d 110, 111 (1st Cir. 2005) (no showing speech ban would diminish fraud); *Bad Frog Brewery v. N.Y. State Liquor Auth.*, 134 F.3d 87, 99-101 (2d Cir. 1998) (no showing speech ban would diminish vulgarity); *Pitt News v. Pappert*, 379 F.3d 96, 107 (3rd Cir. 2004) (no showing speech ban diminished underage drinking); *Psinet, Inc. v. Chapman*, 362 F.3d 227, 238 (4th Cir. 2004) (no showing speech ban would accomplish regulation's objective); *Bailey v. Morales*, 190 F.3d 320, 324 (5th Cir. 1999) (no showing business solicitation harms seniors); *Amelkin v. McClure*, 168 F.3d 893 (6th Cir. 1999) (no showing that speech restrictions would lead to stalkers pursuing

(Continued on following page)

THE PETITION SHOULD BE DENIED

I. THE COURT DOES NOT NEED TO REVIEW THIS CASE BECAUSE THE SIXTH CIRCUIT IS NOT IN DISAGREEMENT WITH ANY JURISDICTION IN THE UNITED STATES.

It is elementary that the Court should grant plenary review only when a petition establishes a decisive conflict with the decisions of this Court or the Circuit Courts of Appeal. Glendale's petition wholly fails on this score.

A. There Is Universal Judicial Agreement On The Unconstitutionality Of Prohibiting Car Window "For Sale" Signs.

There is no conflict on the question this case presents between the Sixth Circuit and any court of

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accident victims), *rev'd in part on other grounds*, 205 F.3d 293 (6th Cir. 2000); *Pearson v. Edgar*, 153 F.3d 397, 404 (7th Cir. 1998) (no showing speech ban was needed because the underlying harm did not exist); *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 654 (8th Cir. 2003) (upholding statute after government produced meaningful evidence of harm); *W. States Med. Ctr. v. Shalala*, 238 F.3d 1090, 1094 (9th Cir. 2001), *aff'd*, 535 U.S. 357 (2002) (no showing speech ban would reduce consumption of certain prescription drugs); *Pac. Frontier v. Pleasant Grove*, 414 F.3d 1221 (10th Cir. 2005) (no showing that speech ban would deter crime); *Mason v. Fla. Bar*, 208 F.3d 952, 958 (11th Cir. 2000) (no showing speech ban on attorney advertising protected the public); *Pearson v. Shalala*, 164 F.3d 650, 656 (D.C. Cir. 1999) (no showing speech ban would reduce consumer confusion).

any stature, including this Court and the Circuit Courts of Appeal. Each of the three courts besides the Sixth Circuit to have addressed the fact-pattern in this case struck down the car "For Sale" sign ban as a violation of the First Amendment. *Burkow v. City of Los Angeles*, 119 F. Supp.2d 1076 (C.D. Cal. 2000); *Milwaukee v. Blondis*, 460 N.W.2d 815 (Wis. Ct. App. 1990) (applying *Central Hudson*); *People v. Moon*, 152 Cal. Rptr. 704 (Cal. App. Dep't Super. Ct. 1978) (pre-*Central Hudson*).

Judicial unanimity of this sort, absent countervailing considerations not present here, should preclude the extraordinary remedy of certification.

B. The Sixth Circuit's Decision That Glendale Needed Real Evidence Of Real Harm To Prohibit Pagan's "For Sale" Sign In The Name Of Traffic Safety And Aesthetics Does Not Conflict With The Decisions Of This Or Any Other Court.

Glendale tries to manufacture a conflict between the Sixth Circuit and this Court by, *pace* the District Court and two-judge panel majority, relying heavily on errant dicta in the four-Justice plurality opinion in *Metromedia*, 453 U.S. at 509, suggesting that reviewing courts should not second-guess the judgment of local lawmakers concerning the traffic safety and aesthetic implications of billboards unless the plaintiff

proves this judgment to be "palpably false."[4] As the en banc majority recognized, Glendale is arguing that the various opinions in *Metromedia* collectively stand for the proposition that commercial speech restrictions in the name of traffic safety and aesthetics get First Amendment protection in name only and the *real* standard of review is actually the rational basis test.

As the en banc majority held, Glendale's conclusion is wrong. *Metromedia* is an ordinary *Central Hudson* case in which the Justices in their various opinions applied intermediate scrutiny. Significantly, the City of San Diego did not, as Glendale does here, assert that the First Amendment is in effect inapplicable when the government restricts speech in the name of traffic safety and aesthetics. Instead, San Diego pointed to a nationwide legislative and judicial consensus at all levels as compelling evidence that billboards, which are deliberately designed to distract people, pose a threat to traffic safety and undermine

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[4] The "palpably false" language upon which Glendale focuses so much attention originates, as mentioned earlier, in *Railway Express*, a 1949 equal protection case that this Court decided a generation before extending the First Amendment to commercial speech. As this Court acknowledged several years after *Metromedia*, the *Metromedia* plurality's citation of the "palpably false" passage from *Railway Express* should be disregarded as errant dicta and irrelevant to the First Amendment because *Railway Express* concerned the "rational basis test used in Fourteenth Amendment equal protection analysis." *Bd. of Tr. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (internal quotation marks and citation omitted).

a community's aesthetic continuity. The en banc majority concluded that the evidentiary weight of this legislative and judicial consensus is the precise equivalent of the proof this Court, as expressed most forcefully in *Edenfield*, has always required under the third-prong of *Central Hudson* to ensure that government never arbitrarily suppresses free speech. *Pagan*, 492 F.3d at 774-775.

Thus the crux of the en banc decision is not, as Glendale mischaracterizes it, Pet. at 1, that municipalities have to produce costly studies or otherwise amass vast extrinsic evidence to defend even a mundane ordinance. On the contrary, the Sixth Circuit simply applied the uncontroversial principle, evident in *Metromedia*, that government censors have an affirmative burden under the First Amendment.

Here, however, Glendale pointed to no legislative and judicial consensus on this question at any level, much less one as comprehensive as that in *Metromedia*. The en banc majority was therefore constrained by longstanding precedent of this Court to strike down an ordinance that – had Glendale enforced and defended it differently – would likely still be on the books.

Glendale thus believes that the en banc decision conflicts with *Metromedia* only because Glendale continues to mistakenly believe that *Metromedia*, as a practical matter, stripped commercial speech of First Amendment protection whenever the government invokes traffic safety and aesthetics. Because,

however, *Metromedia* is firmly situated in the mainstream of this Court's commercial speech doctrine, particularly as it was later elaborated in landmark cases like *Edenfield* and *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503-504 (1996), the conflict Glendale posits is illusory. Glendale's petition should therefore be denied.

C. There Is Also No Conflict Between The Sixth Circuit And This Court Or The Circuit Courts Of Appeal Because Metromedia And The Other Billboard Authority Glendale Cites Are Distinguishable On Their Facts.

The Sixth Circuit's en banc decision does not conflict with *Metromedia* or any other billboard precedent for the further reason that the cases are distinguishable on their facts.[5]

First, *Metromedia* is about billboards and billboards alone because, as the four-Justice plurality emphasized and the en banc majority echoed, each

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[5] Five of the cases Glendale cites to establish a conflict among the Circuit Courts of Appeal are actually billboard cases that are distinguishable on their facts for the same reasons as *Metromedia*. *See Lavey v. The Lakeland Group, Inc.*, 171 F.3d 1110 (7th Cir. 1999); *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793 (8th Cir. 2006); *Ackerly Communications of the Northwest, Inc. v. Krochalis*, 108 F.3d 1095 (9th Cir. 1997); *Ctr. for Bio-Ethical Reform, Inc. v. Cunningham*, 455 F.3d 910 (9th Cir. 2006); *Nat'l Adver. Co. v. The City and County of Denver*, 912 F.2d 405 (10th Cir. 1990).

mode of speech is unique. 453 U.S. at 501 (White, J. plurality opinion) ("Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses, and dangers' of each method. *We deal here with the law of billboards.*") (emphasis added) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949)). The plurality thus expressly foreclosed what Glendale is trying to do here: indiscriminately apply reasoning about gigantic highway billboards to non-analogous contexts like tiny car window "For Sale" signs. *Pagan*, 492 at 774. *See also, e.g.*, *Ballen v. City of Redmond*, 466 F.3d 736, 744 (9th Cir. 2006) (explaining that *Metromedia* only applies to billboards and is not a general license to ban commercial signs). This factual distinction alone establishes that the Sixth Circuit's en banc decision does not conflict with *Metromedia*.

The Sixth Circuit's en banc decision and *Metromedia* are further distinguishable on their facts because their respective traffic safety and aesthetic considerations are fundamentally different.

Beginning with traffic safety, the City of San Diego in *Metromedia* wanted to regulate the physical characteristics of billboards, up to and including prohibiting them, because they are designed to distract people. Glendale, on the other hand, has never argued that tiny car window "For Sale" signs distract anyone. Indeed, Glendale conceded at oral argument that car "For Sale" signs are permissible in cars on private property and in moving vehicles, and that car

window signs are permissible everywhere as long as they do not read "For Sale."

Glendale instead wants to outlaw car "For Sale" signs from cars parked on the street because the Village is apparently worried that people might read the sign and then decide to walk heedlessly into traffic to look at the car rather than look at it from the sidewalk or when there are no cars coming.[6] Thus, in contrast to San Diego, which wanted to regulate the physical characteristics of billboards because they elicit an involuntary reaction, Glendale wants to regulate the specific content of car window signs because it believes without any evidence that, in the context of a car parked on a public street, citizens cannot be trusted with the harmless idea "this car is for sale."[7]

To put it more broadly, San Diego's regulation of the physical characteristics of billboards for traffic

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[6] It is actually difficult to surmise what Glendale thinks might happen if people put "For Sale" signs in their car windows because, as the en banc majority found, Chief Fruchey's vacant affidavit did nothing but vaguely convey his opinion that the purpose of section 76.06 is to keep "attractions" out of the roadway.

[7] Glendale is simply not being candid with the Court when the Village represents in its petition at page 12 that Pagan never argued that Glendale had an improper motive. As discussed in detail below, *infra*. § I.D, Glendale's enforcement of section 76.06 is predicated at least in part on the infantilizing assumption that people cannot be trusted to look at a car advertised for sale without getting run over.

safety was substantially akin to a content-neutral reasonable time, place and manner restriction, whereas Glendale's prohibition on car "For Sale" signs resembles actual censorship.[8] This distinction strongly recommends leaving the Sixth Circuit's en banc decision undisturbed because this Court, even in the context of commercial speech regulation, has always emphatically condemned suppressing speech to protect the listener from what the government believes is a dangerous idea. *See, e.g., 44 Liquormart*, 517 U.S. at 503-504 (stating that speech restrictions designed "to keep people in the dark for what the government perceives to be their own good . . . rarely survive constitutional review."); *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 769-770 (1976).[9]

The aesthetic considerations in *Metromedia* were also different because San Diego sought to diminish the aesthetic impact of the city's ubiquitous gigantic

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[8] There was a controversy in *Metromedia* over the challenged ordinance's preference for commercial over non-commercial speech, but that aspect of the case is not relevant here and does not alter the essentially content-neutral character of San Diego's law.

[9] The *Metromedia* plurality also made it clear that the government's legitimate interest in traffic safety and aesthetics only permits content-neutral regulation. 453 U.S. at 502 (White, J. Plurality Opinion) ("the government has a legitimate interest in controlling the noncommunicative aspects of [billboards] . . . but the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects.") (citation omitted).

billboards. Thus, once again, San Diego's aesthetic regulation was in essence a content-neutral reasonable time, place and manner restriction that focused on the physical characteristics of billboards.

Glendale's purported aesthetic concern is different, and incoherent, precisely because the Village does not care about the physical characteristics of car window signs, just their content. As noted earlier, Glendale never objected to Pagan's car being in the street or his sign *per se*, merely that the sign said "For Sale" instead of, for example, "Vote Clinton" or "I Love Glendale." It would require a vast and illogical expansion of *Metromedia* to enable the government – simply by invoking what Glendale and the en banc dissent concede is just subjective aesthetic caprice – to regulate the specific content, rather than only the appearance, of signs. *Cf. City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (invalidating petty commercial speech restriction justified by aesthetics because the ordinance had only a *de minimis* impact).

The Respondent therefore respectfully asks the Court to deny Glendale's petition because the billboard precedent such as *Metromedia* upon which the Village so heavily relies is factually inapposite.[10]

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[10] The other sign cases Glendale cites to depict an ostensible conflict among the Circuit Courts of Appeal are not only also distinguishable, but actually bad law in some instances. *Long Island Bd. of Realtors, Inc. v. Incorporated Village of Massapequa*

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D. There Is No Conflict Between The Sixth Circuit And Any Other Court On The Use Of Common Sense Because Glendale's Definition Of Common Sense, Not That Of The Sixth Circuit, Is Unsupported In The Case Law.

The overarching theme of Glendale's petition is that the Sixth Circuit, because of an irrational fidelity to form over substance, refused to consider "common sense" in rendering its decision. The Village argues that in doing so the en banc majority supposedly created a conflict with free speech decisions such as *Metromedia*, *Burson v. Freeman*, 504 U.S. 191, 211

Park, 277 F.3d 622 (2d Cir. 2002), which involved a content-neutral sign regulation for residential homes, did not address what *Edenfield* meant for sign regulations of that specific type. *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995), which is actually helpful to Pagan, involved the citation to four substantial studies in defending an advertising restriction on alcohol, but *Anheuser-Busch* is nevertheless likely bad law, as noted by *Pitt News v. Pappert*, 379 F.3d 96, 108 (3rd Cir. 2004), because *Anheuser-Busch* was decided before *Lorillard Tobacco Co. v. Reilley*, 533 U.S. 525 (2001), which invalidated an anti-tobacco law under the third-prong of *Central Hudson* that was similar to the one in *Anheuser-Busch*. *Lindsay v. City of San Antonio*, 821 F.2d 1103 (5th Cir. 1987), is a pre-*Edenfield* case that concerned content-neutral restrictions on portable signs. Finally, *South Suburban Housing Ctr. v. Greater South Suburban Bd. of Realtors*, 935 F.2d 868 (7th Cir. 1991), involved a multi-faceted statutory and constitutional challenge to ordinances regulating a local real estate market that, as stated in *Pearson v. Edgar*, 153 F.3d 397, 402 (7th Cir. 1998), is no longer good law at least on the First Amendment front after *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

(1992) and *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 428 (1993), in which this Court mentioned common sense at least in passing.

Yet whatever the supplementary role of common sense in First Amendment adjudication, Glendale has never understood what was obvious to the en banc majority: simply calling something "common sense" does not make it so. *Pagan*, 492 F.3d at 774 n. 6. There is nothing commonsense about government infantilizing people to the degree that they cannot be trusted to read a "For Sale" sign. Nor is there anything remotely commonsense about banning the words "For Sale" from a sign, but not any other words, to promote aesthetics. Indeed, as illustrated by the Village's insistence on sweeping deference, all Glendale really means by "common sense" is something like "because the government wants to."

The en banc majority recognized, however, that whatever "common sense" means to the First Amendment, it means more than "because the government wants to." *See, e.g., Pearson v. Edgar*, 153 F.3d 397, 402 (7th Cir. 1998). Indeed, as with *Metromedia*, both *Burson* and *Edge* show that Glendale's perverse definition of common sense – a legislative intuition unsupported by any evidence – has no place in the First Amendment, where restrictions on speech are presumptively invalid and subject to searching review.

In *Burson*, this Court upheld a statute regulating political candidate speech in close proximity to polling

places because a sweeping historical, legislative and judicial consensus – extensive evidence of which was part of the record – suggested that tiny buffer zones are necessary to prevent voter intimidation. Justice Blackmun used the locution "common sense" as part of the literary flourish with which he embellished the last substantive line of his opinion. It is absurd to suppose that *Burson*, a contentious strict scrutiny case from 1992 about balancing the fundamental rights of political speech and voting, means that this Court's 1993 commercial speech decision in *Edenfield* was a nullity.[11]

Edge is also inapposite. In *Edge*, this Court was presented with the peculiar issue of a federal statute, enforced by the Federal Communications Commission, that forbade lottery advertisers in lottery states from broadcasting their lottery ads into non-lottery states. Ultimately, this Court concluded that, under principles of federalism, it is properly the prerogative of Congress to reconcile the competing legitimate interests of states within an interstate broadcasting system subject to comprehensive federal regulation.

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[11] In discussing the history of polling place laws in detail, Justice Blackmun also noted that legislators used common sense in recognizing that protecting a voter's interest in anonymity with a secret ballot would be undermined if candidates could hover around polling booths to harangue voters. 504 U.S. at 207-208. But, as explained in footnote 10, Justice Blackmun was actually using the term "common sense" as a synonym for "logical connection," which is altogether different from the definition Glendale urges this Court to accept.

The salient question in *Edge*, therefore, was not so much whether the federal statute addressed a material harm under the third-prong of *Central Hudson*, but rather whether Congress could take federalism concerns into account in trying to cope with incommensurable state policies on gambling. Nothing in *Edge* even slightly altered the affirmative burden set forth in *Edenfield*, and at best the case stands for the proposition that Congress deserves modest regulatory latitude when struggling under exotic facts with a predicament rooted in American federalism. That is scarcely the situation here.

In disparaging the Sixth Circuit for declining to credit legislative "common sense," Glendale has lost sight of the First Amendment's great virtue: the political majority does not get to freely decide what can be said. It may seem *obvious* to Glendale officials that "For Sale" signs are ugly and attract stupid people. But everyone, even in a National Historic Landmark town, has rights under the First Amendment that cannot be abridged merely because the town fathers think certain speech is tacky and a threat to fools. And contrary to the elitist view of the dissent, the "grandeur of the First Amendment" is enlarged, not "cheapened," when the vast power of government is deemed not enough to silence even a few simple words from just one man. *Pagan*, 492 F.3d at 779 (Rogers, J., dissenting).

Glendale's petition should thus be denied because *its* conception of common sense, not that of the Sixth

Circuit, is the one in conflict with the longstanding precedent of this Court.

II. THERE IS NO QUESTION OF EXTRAORDINARY PUBLIC SIGNIFICANCE AT ISSUE IN THIS CASE BECAUSE GLENDALE CAN ADDRESS ITS INTEREST IN TRAFFIC SAFETY AND AESTHETICS BY REGULATING PARKING INSTEAD OF SPEECH.

This entire case is the result of Glendale's continuing failure to understand that it should have enforced its ordinance against Pagan's parking, not his speech. In its petition for certiorari, Glendale asserts that, unless the Sixth Circuit is reversed, the Village will not be able to prevent people from conducting business in the public roadways.

There is, however, a simple and obvious solution to Glendale's "problem." All Glendale needs to do is enact an ordinance that prohibits parking in a public street for the primary purpose of selling a car. Indeed, this is what Section 76.06 appeared to do.

This case unnecessarily took on constitutional proportions when Chief Fruchey and the City Attorney made the mistake of enforcing Section 76.06 exclusively against Pagan's speech. Chief Fruchey should instead have simply asked Pagan to move his car, regardless of whether it had a "For Sale" sign, so long as Pagan's only purpose in parking on the public street in front of his home was to make his car available for potential buyers. Had Chief Fruchey asked

Pagan to remove his car, the effect on the latter's speech would truly have been incidental.

Glendale then made a bad situation worse. Rather than simply acknowledge that Chief Fruchey should not have directed his enforcement against Pagan's speech and settled the case, Glendale argued before the District Court and then on appeal that the Village was free to regulate the content of Pagan's sign without any evidence of its harm because, as a practical matter, the First Amendment does not apply to speech restrictions in the name of traffic safety and aesthetics. As described in the preceding sections, Glendale argues for a novel standard of First Amendment review in which the burden is on *the speaker* to prove that the judgment underlying the speech restriction is "palpably false."

Requiring the speaker to justify his or her speech to government officials is, however, anathema to the First Amendment, which is why the en banc majority was forced to intervene.

The Respondent respectfully suggests that the petition should be denied because the en banc decision of the Sixth Circuit affected the traditional police power of neither Glendale, nor any other municipality in the nation, to regulate parking on its public streets.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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